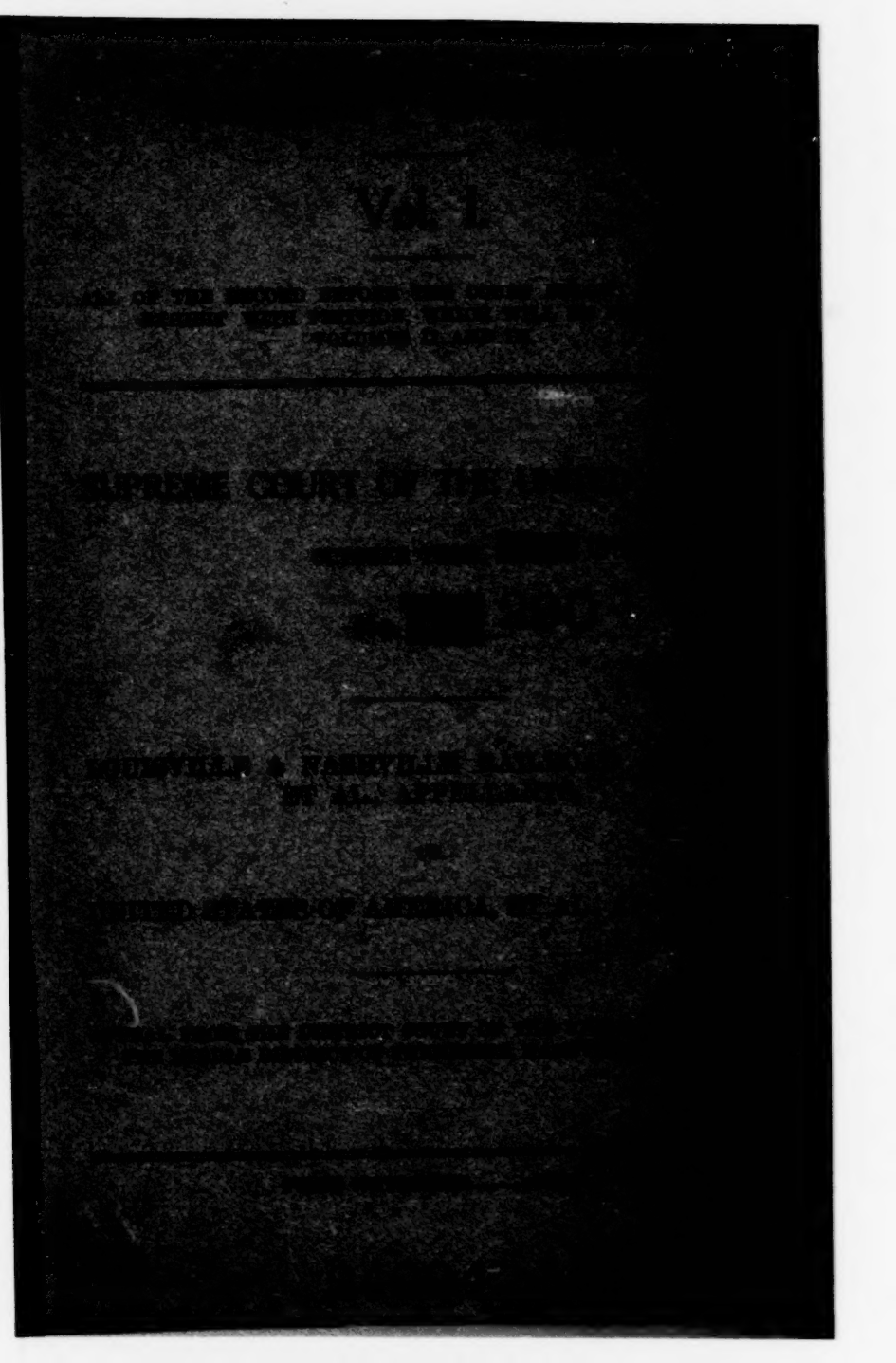

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. ————

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY AND
LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Appellants,*

versus

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE, TRAFFIC BUREAU OF NASHVILLE AND
TENNESSEE CENTRAL RAILROAD COMPANY, - - *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. ————

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY AND
LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Appellants,*

versus

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE, TRAFFIC BUREAU OF NASHVILLE AND
TENNESSEE CENTRAL RAILROAD COMPANY, - - *Appellees.*

APPEAL IN EQUITY FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

RECORD

UNITED STATES OF AMERICA

MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

Record of proceedings of the District Court of the United States within and for the Middle District of Tennessee, Nashville Division, in the cause and matter hereinafter stated.

Present: The Hon. John W. Warrington, United States Circuit Judge; Hon. John E. McCall, United States District Judge; and Hon. Edward T. Sanford, United States District Judge.

Louisville & Nashville Railroad Company,
Nashville, Chattanooga & St. Louis Railway and
Louisville & Nashville Terminal Company, *Plaintiffs,*

versus

The United States of America,
Interstate Commerce Commission,
City of Nashville, Traffic Bureau of Nashville and
Tennessee Central Railroad Company, - *Defendants.*

In Equity, No. 30.

This action was commenced on April 2, 1915, and proceeded to final disposition, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders and report were made and entered in the order and on the dates hereinafter stated, to-wit:

On the 2d day of April, 1915, the following petition was filed, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, AND THE LOUISVILLE & NASHVILLE TERMINAL COMPANY, - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CITY OF NASHVILLE, TRAFFIC BUREAU OF NASHVILLE, TENNESSEE CENTRAL RAILROAD COMPANY, - *Defendants.*

PETITION.

To the Honorable the Judges of the District Court of the United States for the Middle District of Tennessee:

Plaintiffs, the Louisville & Nashville Railroad Company, a corporation organized under the laws of the State of Kentucky and a citizen and resident of such State, having its principal place of business in Louisville, in the Western Federal District thereof, and the Nashville, Chattanooga & St. Louis Railway and the Louisville & Nashville Terminal Company, corporations duly organized under the laws of the State of Tennessee, and citizens and residents of such State, each having its principal place of business in Nashville, in said State, in the Middle Federal District thereof, bring this their petition against the United States of America, the Interstate Commerce Commission, the City of Nashville, the Traffic Bureau of Nashville, and the Tennessee Central Railroad Company, the last three of which are corporations organized and existing under the laws of the State of Tennessee, each with its principal place of business in said city of Nashville.

Plaintiffs state that the Louisville & Nashville Railroad Company owns, and for many years has operated, a line of railroad which reaches Nashville, Tenn., from Louisville and other cities on the north, and extends from

Nashville to Birmingham, Ala., and other points on the south; that the Nashville, Chattanooga & St. Louis Railway's railroad enters Nashville from the west and extends through the city southeast to Chattanooga, Tenn., and other points and that the only other railroad which serves the city of Nashville is that of the defendant, Tennessee Central Railroad Company, which enters Nashville from the northwest and extends through the city eastward to Harriman, Tenn.

Plaintiffs state that the Louisville & Nashville Terminal Company owns, partly in fee and partly by lease, a strip of land situated near the center of the city of Nashville upon which the Union Station and other terminal facilities have been constructed, but that all of its said property was leased to the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway by lease of June 15, 1896, modified as of December 3, 1902. Said leases are set out in the transcript of evidence hereinafter filed, to which reference is hereby made for a more particular description of its property and the terms of said leases. Said corporations will be referred to herein respectively as Louisville & Nashville, Nashville & Chattanooga, Tennessee Central and the Terminal Co.

Plaintiffs state that on January 17, 1914, defendants, the City of Nashville and the Traffic Bureau of Nashville, filed a complaint with the Interstate Commerce Commission, hereinafter called the Commission, whereby they sought to have said Commission, by its order, require plaintiffs to switch cars of competitive traffic between industries upon their tracks and points of connection with the Tennessee Central, and, in like manner, to require the Tennessee Central to perform the same service for plaintiffs between said points of connection and industries upon its tracks; and in which they also sought to have the non-competitive switching charge of $3.00 per car reduced to $2.00, and to have all switching service performed at that rate. A copy of said complaint is filed herewith as a part hereof marked for identity Exhibit A.

Plaintiffs state that they duly filed their separate answers to said complaint, copies of which are filed herewith as parts hereof, marked Exhibits B and C and D, respectively. They state that the Tennessee Central took no real part in the defense of said proceeding and did not participate in the argument, either orally or by brief, so that the contest became one solely between said com-

plainants and these plaintiffs, who were defendants to said proceeding.

Plaintiffs state that on March 25, 1914, and succeeding days, a formal hearing of said complaint was had in the city of Nashville, at which all the interested parties were represented, when voluminous evidence in the form of oral testimony, maps, contracts, deeds, leases, records and other documents was offered and received. A transcript of all the evidence offered and received in said proceeding, including all exhibits, is filed herewith as part hereof marked Exhibit E. This exhibit is, for convenience, divided into two parts, the first containing all the testimony and documentary exhibits, the second containing all the maps and blue-prints.

Plaintiffs state that thereafter on February 1, 1915, the Commission made and filed its report in which it held that the defendants, who are plaintiffs here, were guilty of an unjust and unreasonable discrimination in refusing to switch competitive traffic to and from the Tennessee Central Railroad Company, and entered an order requiring plaintiffs to cease and desist, on or before May 1, 1915, and thereafter to abstain, from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central at Nashville, Tenn., on the same terms as interstate non-competitive traffic, while interchanging, as said report alleged, both kinds of interstate traffic on the same terms with each other; and further ordered plaintiffs to establish on or before May 1, 1915 (subsequently extended to June 1), upon thirty days' notice to the public and said Commission, and thereafter to maintain and apply to the switching of interstate traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, "rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city." A copy of said Commission's report, marked Exhibit F, and of said order, marked Exhibit G, are filed herewith as parts hereof.

Plaintiffs state that since December 3, 1902, plaintiff, Louisville & Nashville Terminal Company, has had no participation direct or indirect in the operation of any terminals or in the switching arrangements between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, or in any of the matters or subjects referred to in aforesaid complaint, report and order; that it has not been guilty of any of the practices which the order of the Commis-

sion hereinafter mentioned requires it to abstain from; that it is unable to do any of the things which it is required by said order to do; and that the order, and every part thereof, so far as it relates to the said Louisville & Nashville Terminal Company, is arbitrary, illegal and void, and is wholly without evidence of any sort to support the same. Plaintiffs state that references hereinafter to the arrangements and practices between "plaintiffs" relate specifically to those between the plaintiffs, Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway.

Plaintiffs state that the aforesaid order, as made and filed by the Commission, is illegal, null and void, and that said Commission is without jurisdiction, power or authority in law to make or enforce the same; that it is arbitrary and unsupported by any substantial evidence, and was made because of a mistake of law in the interpretation of the Act to Regulate Commerce, under which act alone the Commission proceeded in making its report and order aforesaid; that said order is in violation of the said Act to Regulate Commerce; that it is impossible of compliance; that it is confiscatory and illegal in requiring the complainants to perform for the Tennessee Central Railroad Company the switching service ordered at the actual cost thereof, exclusive of fixed charges, and without profit; and that it takes plaintiffs' property without due process of law and denies to them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs state that the grounds upon which said order is illegal and void, as set out above, rest in the facts, circumstances and principles of law hereinafter set forth, and as to said facts they state that no evidence whatever controverting them, or any of them, was introduced at said hearing, but that each and all of them are established conclusively and indisputably by the evidence, as fully appears in the transcript hereinbefore filed as a part of this petition.

The term switching, as used in this and similar cases that have come before the Commission and the courts, is the movement of a loaded car between an industry on the terminal tracks of one railroad and the point of connection with another railroad. Whether it be an outbound car moving from the industry to the point of interchange with the other railroad, or an inbound car moving from the said point of interchange to the industry, the movement is performed by the engine and crew

of the company upon whose tracks the industry is located, and that company is said to switch for the other. If the car originated at, or is destined to, a point reached by the company owning the terminals (either with its own tracks or in conjunction with its connections), and the rate is the same by either route, the traffic is "competitive," as used in the tariffs and by the Commission in this case. Such traffic, which always either originates on, or is destined to, an industry on the tracks of the company owning the terminals, the latter refuses to switch, because to do so would enable its competitor to begin or finish the transportation service, which otherwise it could not render, and thus to obtain the profitable road-haul revenue, while the company owning the terminals would receive only a switching charge. But, by refusing to switch this competitive business, the owning company, being itself able to perform the complete service between origin and destination at the same rate, properly receives the road-haul revenue upon traffic moving to and from industries which enjoy the benefit of a location upon its terminal tracks.

The ground of the objection to switching competitive traffic for a competitor is that the carrier owning the terminals has acquired them at great cost solely as an aid and incident to the performance of this transportation service, and, if their use is thus turned over to a competitor, the owning company is not only deprived of the road-haul revenue to obtain which it acquired these terminals, but it sees a competitor, by the use of its property, enriched to the exact extent of its own money loss, while the public, represented by the shipper, saves nothing, because the same freight charges apply over either line. Nor would the insignificant switching charge deter a competitor from actively soliciting the business of these industries, for it is glad enough to charge the shipper only the transportation rate, thus itself absorbing the insignificant switching charge, in order to get the large road-haul revenue. In this way the competitor, besides sharing the business of the company owning the terminals, would as a quasi-partner, enjoy its terminals upon more favorable terms than the owner itself, as it would get all the benefits of ownership without participating in the original cost or in the continuing expenditures for maintenance, taxes, interest, repairs and other fixed charges.

If, however, the company owning the terminals can not, by itself or its connections, make the complete line haul (as, for example, to a station located exclusively on

its competitor's line), that traffic is said to be "non-competitive," as that word is used in this case, and the company owning the terminals freely switches the cars between the industry upon its tracks and the point of interchange with its competitor at the nominal switching charge of $3.00 per car. This charge for non-competitive switching has been fixed at a nominal figure in order to help the industry by putting it in touch with as many markets, both buying and selling, as possible.

I.

Plaintiffs state that the basis of the Commission's order, that they cease discriminating against the Tennessee Central and switch for it upon the same terms upon which they switch, as the Commission claims, for each other, is the finding in its report that the plaintiffs switch for each other, and hence that their refusal to switch for the Tennessee Central is a discrimination. Such finding of the Commission is thus expressed in its report, at pages 84 and 85 (italics ours):

> "Defendants unquestionably interchange traffic with each other and without distinction between competitive and non-competitive traffic. The cars of both roads are moved over the individually owned terminal tracks of the other to and from industries on the other, and both lines are rendered equally available to industries located, exclusively on one. The movement, it is true, is not performed immediately by the road over whose terminal tracks it is performed, but neither is it performed immediately by the road whose cars are moved. It is performed by a joint agent for both roads, and that being so, we are of the opinion that the arrangement is essentially *the same as a reciprocal switching arrangement* and accordingly *constitutes a facility* for the interchange of traffic between, and for receiving, forwarding, and delivering property to and from defendants' respective lines, within the meaning of the second paragraph of Section 3 of the Act. The joint maintenance and operation of the tracks utilized in a sense constitutes the terminal tracks of each road the tracks of the other, but inasmuch as both roads contribute nearly the same track mileage and defray the joint expenses in proportion to the number of cars handled for each the arrangement can not

differ materially in ultimate consequences from an arrangement whereby each road performs all switching over its own tracks and interswitches traffic with the other. The Louisville & Nashville contributes 8.10 miles of main and 23.80 miles of side tracks; the Nashville, Chattanooga & St. Louis, 12.15 miles of main and 26.37 miles of side tracks. We can not agree with defendants' contention that they have merely exchanged trackage rights. But even if they have, we think the term 'facility,' as used in Section 3 of the Act, also *includes reciprocal trackage rights over terminal tracks,* the consequences and advantages to shippers being identical with those accruing from reciprocal switching arrangements. * * * Since defendants interchange traffic with each other they can not refuse to interchange traffic upon substantially the same terms with the Tennessee Central, *provided the circumstances and conditions are substantially the same,* and defendants are not required 'to give the use of their tracks or terminal facilities' to the Tennessee Central within the meaning of the concluding proviso of Section 3."

Plaintiffs state that the Commission erred in holding that plaintiffs switch for each other and that the arrangement between them is essentially the same as a switching arrangement, because all of the facts, appearing in the record and specifically admitted in the Commission's report, show that the plaintiffs do not switch for each other either competitive or non-competitive traffic, and hence that their failure to switch for the Tennessee Central is not, and can not be, a discrimination against that company. Said uncontroverted facts, briefly stated, are substantially these:

Prior to 1872 the Louisville & Nashville Railroad Company's line into Nashville from the north terminated at a point in the northern part of the city, while its southern line, known as the Nashville & Decatur Railroad, terminated at a point several miles south of the terminus of this northern line.

Separate terminals were maintained at these two points and the Louisville & Nashville had no tracks of its own within the city connecting them. The only other railroad tracks in Nashville at that time were owned by the Nashville & Chattanooga Railroad and its subsidiary company, the Nashville & Northwestern. The Nashville & Chattanooga was the same railroad as the

present Nashville, Chattanooga & St. Louis Railway, the name having been changed in 1873.

On May 1, 1872, a contract was entered into between the Nashville & Chattanooga and the Louisville & Nashville whereby, for an agreed rental and certain other considerations (relating to the construction of additional tracks, partly for the Louisville & Nashville and partly for the Nashville & Chattanooga) the Louisville & Nashville acquired trackage rights over the Nashville & Chattanooga's lines through the City of Nashville, including the depot grounds. In 1893, in order to facilitate the construction of a union passenger station and other appurtenant facilities in the central part of the city, the Louisville & Nashville Terminal Company was formed by the plaintiffs. Following its organization the Terminal Company existed in name only until April 27, 1896, when the two constituent companies leased to it all of the property and railroad appurtenances thereon, which the lessors severally owned or controlled within or in the immediate vicinity of the original depot grounds of the Nashville & Chattanooga. The Terminal Company agreed to construct on the premises passenger and freight buildings, tracks and other terminal facilities. Shortly thereafter, on June 15, 1896, the Terminal Company leased back to the Louisville & Nashville and the Nashville & Chattanooga jointly all property acquired by it from those companies under the lease of April 27, 1896, together with all other property which the Terminal Company had subsequently acquired, or might thereafter acquire. This lease was made in accordance with the charter of the Terminal Company which expressly authorized it to lease its property and terminal facilities to any railroad company utilizing them upon such terms and for such time as might be agreed upon by the parties. On June 21, 1898, the Terminal Company agreed with the city of Nashville to construct a union passenger station on the premises covered by the leases of April 27 and June 15, 1896, and certain freight stations, platforms, tracks, switches, viaducts, new streets and extension of existing streets in consideration of the city securing the necessary condemnations of land, closing certain streets and erecting approaches to certain of the viaducts to be constructed by the Terminal Company. In previous negotiations the city had required that provision be made in this contract for the admission of future railroads to these terminals, but plaintiffs had refused to build the terminals upon those terms, and when the contract was finally made no provision of that sort was inserted. The

further history is thus given in the report of the Commission at page 80:

> "The improvements agreed upon were duly made at a cost of approximately $100,000 to the city and of several million dollars par value of bonds to the terminal company, which bonds were guaranteed by the Louisville & Nashville and Nashville, Chattanooga & St. Louis as authorized by the terminal company's charter, and were used to repay funds advanced by the guarantors to the terminal company and expended by the latter for the construction of the facilities which it had undertaken to construct. Pursuant to this agreement the terminal company constructed a union passenger station, two adjoining freight depots, a roundhouse, some coal chutes, and adjoining yard tracks. The tracks constructed are connected with the tracks of the Louisville & Nashville and of the Nashville, Chattanooga & St. Louis, but not with the tracks of the Tennessee Central. On December 3, 1902, the lease of June 15, 1896, from the terminal company to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly was modified and in part rescinded. The duration of the lease was reduced from 999 to 99 years, its monetary considerations were modified, and the lessees were reinvested in severalty with their original titles to all the property leased by them to the terminal company, April 27, 1896, except for the intervening lien of the first mortgage for $3,000,000 which had been given to secure the terminal company's bonds.
>
> "The Louisville & Nashville owns all of the capital stock of the terminal company and 71.776 per cent of the outstanding capital stock of the Nashville, Chattanooga & St. Louis, which it began to acquire in 1880."

In the above-mentioned lease of June 15, 1896, from the Louisville & Nashville Terminal Company to the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, in addition to the usual covenants of a lessee there was contained the following, which is therein designated as Article 12, to-wit:

> "Said second parties do hereby, for themselves, and their respective successors and assigns, covenant with said first party, its successors and assigns, that

as rent for the premises, or property described in the first article, and for rent of the improvements described in the ninth article as passenger and freight depot buildings, office buildings, sheds, warehouses, roundhouses, shops, and other buildings, erections, and structures, and main and side railroad tracks, switches, cross-overs, and turn-outs, and other terminal facilities, and all additions thereto and extensions thereof, said second parties, and their respective successors and assigns will pay to said first party, its successors and assigns, annually, in each and every year during the term granted in said first article, and during the term that may be granted in any new lease which may be executed, as provided in the sixth article, and during the term that may be assigned in any assignments of the leases mentioned in the second, third, and seventh articles, a sum equal to interest at four per cent per annum upon the actual cost of all expenditures heretofore made, or to be hereafter made by said first party, its successors and assigns, from time to time, in the purchase, or other acquisition of said premises or property, and in the erection and construction of said improvements, and of all additions thereto, and extensions thereof, and to all taxes, rates, charges, and assessments that may be levied or imposed during the term or terms aforesaid, upon said premises, or property, and said improvements, and all additions thereto, and extensions thereof, and to the cost of such insurance as may be necessary to keep said premises, or property, and said improvements and all additions thereto and extensions thereof, insured to their full value during the term or terms aforesaid.

"On the first day of October in each and every year, during the term or terms aforesaid, the sum which will be due as rent aforesaid for the next succeeding years upon the basis in this article established, shall be ascertained and fixed by the parties hereto; and the sum so ascertained and fixed shall be paid by said second parties, and their respective successors and assigns, to said first party, and its successors and assigns, in equal quarterly payments on the first days of October, January, April and July in the year for which said sum may be so established and fixed."

Plaintiffs state that, as shown in the Commission's report, said mortgage was for $3,000,000, but that in fact only $2,535,000 of such bonds were issued, and it is upon that amount that plaintiffs, by said lease, became obligated to, and regularly do, pay the 4% per annum mentioned in said Article 12, as rental for the Terminal Company's property. Plaintiffs state that on December 3, 1902, said lease of June 15, 1896, was modified so as to restore to the said Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway the various parcels of property which they had respectively leased to the said Terminal Company on April 27, 1896, subject however, to the lien of the above-described mortgage; but no change was made in Article 12 of the original lease, hereinabove mentioned.

Prior to August 15, 1900, plaintiffs operated their respective terminals independently and switched for each other at the nominal charge of $2.00 per car, which charge upon competitive traffic was absorbed. On August 15, 1900, which was practically contemporaneous with the completion of the joint terminal facilities above described, plaintiffs, in order to enjoy the joint terminal property (which they had acquired by lease from the Terminal Company, and upon which they had jointly procured the construction of the freight and passenger buildings and appurtenant tracks) and also to provide for the joint maintenance of same and the payment of the annual rental of $101,400, entered into an agreement which provided for the joint operation of said terminals, through certain joint employes and with equipment contributed a part by each, said joint terminals and the arrangement for operating them through joint employes and equipment being designated, for convenient reference and for the keeping of the accounts of the constituent members, as the "Nashville Terminals."

Furthermore, the principal points of interchange for traffic moving between plaintiffs' lines are on the tracks of the Terminal Company in the center of the city, which necessarily involves some use of the jointly owned facilities in movements between the rails of one company and industries upon the rails of the other; and the Louisville & Nashville, through its long-standing trackage contracts, already had the equal use of some of the Nashville & Chattanooga individually owned tracks. Under these circumstances, for plaintiff to have conducted separate terminal operations for their separately owned tracks, while jointly operating and maintaining their joint terminal facilities, would have been impracticable and im-

provident. Accordingly, in said contract of August 15, 1900, plaintiffs agreed to and did contribute, each to the other, for their joint use through said Nashville Terminals, their joint agency, all of their individually owned tracks within the switching limits of Nashville, except certain freight houses and team tracks, for the term of 99 years from June 15, 1896.

Plaintiffs state that upon the execution of said contract, and at a time when no other railroad was serving Nashville, they organized said joint agency for the ownership, operation and maintenance of all said joint terminal facilities, including the individually owned tracks; that same has been continuously in effect since then to the present time; and that it is the same arrangement which the Commission, in its said report, holds to be a facility which discriminates against the Tennessee Central.

Plaintiffs state that pursuant to this arrangement said "Nashville Terminals" takes charge of all incoming trains (passenger as well as freight), upon arrival, breaks them up, distributes the cars, incidentally places the local cars at the proper industries to which they are destined (but likewise handles all through cars), reverses the process as to outbound trains, freight and passenger, and does all other terminal service whatsoever, including the operation of the Union Depot and its accessories. The cost of this is divided between the two roads monthly upon a wheelage basis, that is, in proportion to the number of cars handled for each.

Plaintiffs state that by virtue of said contract each acquired and owns trackage rights over the tracks of the other and publishes in its tariffs that it reaches all the industries upon both; and that each does in fact deliver cars to all industries without making any switching charge against the other or the shipper for either competitive or non-competitive business. They say that in law, as well as in fact, each car is handled to the industry to which it is destined, or from which it originates, over a track which the company making the line haul has the legal right to use, and with agencies which said company employs and for such service itself pays; and that the fact of another company having an equal right to the use of said track and operating agency in nowise changes the legal relation of the first named company to the transaction. Plaintiffs say that they are simply using their own property and rights acquired by them at great cost, and that their said joint use of their own joint property does not, and can not, constitute a discrimination against

a third railroad which has no interest therein. And hence the third railroad can not lawfully be admitted to a participation in the service or the property, which the two roads, in the use of their own joint property, enjoy.

Plaintiffs accordingly state that they do not switch for each other; that they are not guilty of discrimination in refusing to switch for the Tennessee Central; that the finding of the Commission that they do so switch for each other is contrary to the indisputable character of the evidence and unsupported by any evidence, and that the order based thereon is illegal, arbitrary and void.

II.

Plaintiffs state that if the arrangement above described should be held to constitute any sort of switching service rendered by one of the constituent companies to the other, and should be held to constitute some sort of discrimination against the Tennessee Central Railroad Company (both of which propositions plaintiffs deny) such alleged discrimination is not an unreasonable or an unjust one, and is not such as the Act to Regulate Commerce forbids, because the evidence heard by the Commission conclusively and without contradiction shows that the circumstances and conditions are not only not substantially similar (an essential element to unlawful discrimination), but are materially and vitally different. The difference, broadly speaking, is that, in one case, two railroads jointly use their own joint property, and, in the other, would render an independent service with such property for an outsider. The alleged discrimination contemplated by the Act to Regulate Commerce can not exist because of these, among other considerations:

(1) The regular switching service sought for the Tennessee Central involves the movement of a car between an industry upon the track of, say, the Louisville & Nashville to the point of interchange with the Tennessee Central. This movement is necessarily made by the Louisville & Nashville as the Tennessee Central has no right, and is not allowed, to come upon the Louisville & Nashville terminal tracks with its engine.

In the case of a movement between the same industry and the rails of the Nashville & Chattanooga, the latter owns as great a right to use the Louisville & Nashville terminal track as the Louisville & Nashville does, and it does use it, actually and physically, by sending an engine and crew over said tracks to the Louisville &

Nashville industry to bring the car to its transportation track. The engine and crew are jointly employed, but it is none the less the agency of the Nashville & Chattanooga —and it operates on the Louisville & Nashville track.

(2) The plaintiffs own jointly as lessees a central yard for which, including station facilities, they pay an annual rental of more than one hundred thousand dollars. The trains of each are brought into this central terminal district and there broken up, and the cars are switched to the various industries located either upon these jointly owned central tracks or upon the individually owned, but jointly used, tracks which radiate out from the central yards.

The Tennessee Central has no interest in this central district and does not connect with in in any way. Its connection with the Nashville & Chattanooga is about two miles from the central terminals and with the Louisville & Nashville it is outside of the city of Nashville. The undisputed evidence shows that it is impossible, therefore, for it to offer its cars for switching to points upon the Louisville & Nashville and the Nashville & Chattanooga, under operating conditions and circumstances substantially similar to those involved in a movement between the Louisville & Nashville and Nashville & Chattanooga.

(3) In the interchange of cars between the Louisville & Nashville and the Nashville & Chattanooga there is, and can be, no uniform nor arbitrary charge for such switching. Under their joint arrangement each pays the exact cost of its use of the joint facilities and agency. This is impossible with respect to switching to or from the point of connection with the Tennessee Central, without admitting the Tennessee Central to said joint operating arrangement upon the same terms. And this is a thing which the Commission is powerless to order, and which, even if it were desirable, plaintiffs would be powerless to enforce without the consent of the Tennessee Central.

(4) The exchange of trackage rights is not, as declared by the Commission, a facility, in the meaning of that word as used in the Act to Regulate Commerce. Nor is there here a mere exchange of such rights. The so-called exchange of rights in the individually owned tracks was a necessary and proper incident to the larger contract for the joint construction and operation of all the terminals, including the union station, depot buildings, team tracks and the joint conduct of all terminal business, including the handling of all passenger and through

freight, as well as the city traffic. Then, too, this is an arrangement between two kindred, not stranger, companies which, though under different managements, are closely allied and properly unite in joint terminal enterprises, because one owns over 71 per cent of the capital stock of the other. And the beneficial result to the public is the fact that it has to pay no switching charge—neither competitive nor non-competitive.

III.

The Commission's report and order are contrary to both the spirit and the letter of the Act to Regulate Commerce, and the subject-matter thereof is not within the Commission's jurisdiction because:

(1) They violate Section 15 in ordering competitive switching and thus forcing one carrier to join another in making a through route, which embraces less than the entire length of the refusing company's railroad.

The Commission, at page 88 of its report, thus finds and declares that the service here involved is a "railroad haul" and constitutes "transportation," in contradistinction to a mere switching service (italics ours):

> "Most of the industries involved are situated from 2 to 7 miles from Shops Junction. The service asked is a *railroad haul,* and in our opinion constitutes *transportation,* as defendants tacitly concede when they argue that the local rates to and from Shops Junction and Vine Hill at which they had moved Tennessee Central competitive traffic are transportation rates for transportation to and from local points."

This being true, the Commission, in prescribing what is in effect a through route, was bound by, but violated, the following provision of Section 15 of the Act to Regulate Commerce:

> "And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with

another practicable through route which could otherwise be established."

(2) If, on the other hand, the transaction involved is a mere switching service, the order is violative of the proviso to Section 3 of the Act, for, while a joint owning and operating arrangement is not, as held by the Commission at page 85 of its report, a "facility" as used in said section, yet, if it were, then the affording of such a "facility" to the Tennessee Central would not be a "proper or reasonable" thing, and it also would be in violation of the following proviso to said Section 3, which was designed to protect a railroad's terminals from just what is here sought:

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

If required merely to switch to and from the Tennessee Central, it would be giving to that road—their competitor—the commercial use of said terminals in order to enable it to begin or complete a transportation haul; if required to allow the Tennessee Central to run its engines upon said terminal tracks and move cars to and from the point of connection (as the two constituent companies do), it would be giving it the physical use of said terminals. Both of said uses come within the prohibition of said proviso.

IV.

Plaintiffs state that at page 90 of its report the Commission, in summing up its conclusion in this case, used the following language (italics ours):

> "Under all of the circumstances disclosed we are of the opinion and find that defendants' refusal to switch competitive traffic to and from the Tennessee Central at Nashville on the same terms as non-competitive traffic while interchanging both kinds of traffic on the same terms with each other is unjustly discriminatory, and that so long as defendants switch both competitive and non-competitive traffic for each other at Nashville *at a charge equal to the cost of the service, exclusive of fixed charges*, the charges imposed for switching Tennessee Central traffic *should not exceed the cost of the service performed.*"

Plaintiffs state that the Commission's said finding that the plaintiffs switch both competitive and non-competitive traffic for each other at Nashville at a charge equal to the cost of service, exclusive of fixed charges, is an arbitrary finding, which is wholly unsupported by any evidence, and is, in fact, disproved by all the evidence in the case. While still denying that the plaintiffs switch for each other at all, plaintiffs state that, if their joint owning and operating arrangement should be held to constitute a reciprocal switching arrangement, the burden upon them for performing such service is necessarily much greater than the actual cost of such service, excluding fixed charges, and that in determining the extent of such burden the Commission should have considered, not only the cost of the service, excluding fixed charges, but also a proper and equitable proportion of the taxes, interest, rental and other fixed charges, and a fair return upon their property devoted to such service. Accordingly plaintiffs say that so much of the Commission's report, embraced in the above quotation, as finds that "the charges imposed for switching Tennessee Central traffic should not exceed the cost of the service performed" is also arbitrary and unsupported by any evidence.

Plaintiffs further say that if the order itself, which is ambiguous, is to be construed, in the light of the report, to mean that plaintiffs, while maintaining the existing arrangement as between themselves, shall switch interstate traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville for rates and charges that shall not exceed the actual cost of the service, exclusive of fixed charges, then said order is confiscatory and the enforcement of same will take plaintiffs' property without fair or just compensation, in violation of the Fifth Amendment to the Constitution of the United States, for the reason that such a charge, upon its face, will not yield anything for taxes upon the property and facilities involved in conducting the traffic, and will not allow nor afford a fair and reasonable return, or any return whatever, upon the value of the property necessarily devoted by plaintiffs to public use in the performance of such service. Said property, attributable to the furnishing of said particular service, is a substantial amount, to-wit, the sum of at least two and one-half million dollars ($2,500,000), and a fair and reasonable return thereon would be at least eight per centum.

They state that, adding to the operating cost (found by the Commission to be $4.13 per car) the taxes and a fair and reasonable return upon their property attributable to said service, the cost thereof, if the Commission had power to order it, should be, and is, not less than $7.50 per car.

V.

Plaintiffs say that the portion of the order of the Commission which requires them to switch interstate traffic to and from the tracks of the Tennessee Central at rates and charges "which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city" is impossible of compliance:

(1) Because they do not maintain any charges for switching between their respective tracks.

(2) Because, if the Commission means that plaintiffs shall publish as a fixed rate for switching to and from the Tennessee Central a charge equal to the expense which each company incurs in making a similar movement between the point of interchange and industries upon its joint associate's tracks, then, besides, being confiscatory, such a charge would necessarily and constantly vary in amount and hence could not be published as a fixed rate.

(3) Because the only remaining method of putting the three lines upon a parity, namely, the admission of the Tennessee Central into plaintiff's joint owning and operating arrangement, besides being unconstitutional and illegal, would, if authorized by law, be impossible of enforcement against the Tennessee Central without its consent.

Plaintiffs state that unless an interlocutory injunction be issued herein, enjoining the execution and enforcement of the aforesaid order during the pendency of this action, great and irreparable injury will result to them, for the reason that they will suffer heavy loss of road-haul revenues which will go to the Tennessee Central Railroad and its connections, and will otherwise be caused great loss, expense and inconvenience, as hereinbefore set out.

Plaintiffs state further that, while the order herein complained of does not become effective until June 1, 1915, it requires them to prepare, publish and file new tariffs for the use of the Interstate Commerce Commission and the public on or before May 1, 1915, in order to give the thirty days' notice prescribed by said order,

which will necessitate furnishing said new tariffs to the printer not later than April 26, 1915. They state that, in addition to the expense of printing, there is also involved the expense and labor of distributing these new tariffs, to the number of 1,935, to all of their local freight agents over both systems, as well as to their general, division and soliciting representatives throughout the entire country, and to certain shippers. Plaintiffs state that if the court is not prepared to render its decision upon the motion for an interlocutory injunction before April 26th, they are entitled to a temporary restraining order, to be in force until the motion for an interlocutory injunction is passed upon, not only because the expense and labor of promulgating the new tariffs would be unnecessary, if the court should grant such interlocutory injunction, but also because in that event it would be necessary to proceed to cancel said new issue of tariffs and reissue the old tariffs, and the public generally, particularly the shippers over the plaintiff's lines of railroads wherever located, would be greatly inconvenienced because of the confusion and complications which would necessarily arise out of the issue of the new tariffs and their early cancellation and the reissue of the old ones.

Wherefore, plaintiffs pray:

(1) That an interlocutory injunction issue herein suspending and restraining the enforcement, operation and execution of the order made and entered by the Interstate Commerce Commission herein complained of pending the final hearing and determination of this suit; and, if the motion for an interlocutory injunction is not decided on or before April 26, 1915, that a restraining order of like effect issue to remain in force until the motion for an interlocutory injunction is disposed of;

(2) That upon final hearing a decree be entered herein setting aside and annulling said order, and perpetually enjoining the defendants and their agents, servants and representatives from enforcing same, and from taking steps or instituting any proceedings for the enforcement thereof;

(3) That a writ of subpoena be granted and directed to the defendants and each of them, commanding them at a certain date and under a certain penalty specified to appear and make full, true and complete answer to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide such orders and decrees herein as

shall seem meet and proper in equity and good conscience.

And plaintiffs pray for their costs and for such other and further relief as justice and equity may require.

HENRY L. STONE,
WILLIAM A. COLSTON,
R. WALTON MOORE,
F. W. GWATHMEY,
EDWARD S. JOUETT,
Solicitors for Plaintiffs.

State of Kentucky, }
County of Jefferson. }

Affiant, A. R. Smith, states that he is the Third Vice-President of the Louisville & Nashville Railroad Company, one of the plaintiffs herein; that in said official capacity he has charge and supervision of the traffic affairs of said company, which include the matters involved in this suit; and that the statements of the foregoing petition are true, as he believes.

A. R. SMITH.

Subscribed and sworn to before me by A. R. Smith, this April 1, 1915. My commission expires January 30, 1916.

[Seal] GEORGE R. EWALD,
Notary Jublic, Jefferson Co., Ky.

With this petition, as an exhibit, was filed a certified copy of the entire record of the proceeding before the Interstate Commerce Commission. This transcript of proceedings appears as Volumes II and III of this record.

The foregoing petition and exhibits were endorsed:

Filed April 2, 1915. H. M. Doak, Clerk, by F. B. McLean, D. C.

On April 2, 1915, the following application of plaintiffs for an interlocutory injunction and temporary restraining order was filed, to-wit:

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

APPLICATION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER.

Come the plaintiffs, Louisville & Nashville Railroad Company, Nashville & Chattanooga Railway, Louisville & Nashville Terminal Company, by counsel, and, upon the grounds set out in the petition herein, hereby make application to the United States District Court for the Middle District of Tennessee, and the judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission referred to in the petition herein, being the order entered on February 1, 1915, in the proceeding lately pending before said Commission, docketed as No. 6484, and entitled City of Nashville, *et al.*, v. Louisville & Nashville Railroad Company, *et al.*, involving switching arrangements at the City of Nashville; and, also, to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said order of the Interstate Commerce Commission pending the application for said interlocutory injunction. And they ask that a time and place for hearing said application be fixed so that at least five days' notice of said hearing may be given to defendants.

H. L. STONE,
W. A. COLSTON,
R. WALTER MOORE,
F. W. GWATHMEY,
EDWARD S. JOUETT,
Solicitors for Plaintiffs.

The foregoing application was endorsed:

Filed April 2, 1915, H. M. Doak, Clerk, by N. T. Arnett, D. C.

On April 3, 1915, the following order as to hearing on injunction was entered:

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

This cause came on to be heard on the 3d day of April, 1915, before the court upon plaintiff's application for an interlocutory injunction and temporary restraining order, as follows:

Come the plaintiffs, Louisville & Nashville Railroad Company, Nashville & Chattanooga Railway, Louisville & Nashville Terminal Company, by counsel, and, upon the grounds set out in the petition herein, hereby make application to the United States District Court for the Middle District of Tennessee, and the judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission referred to in the petition herein, being the order entered on February 1, 1915, in the proceeding lately pending before said Commission, docketed as No. 6484, and entitled City of Nashville, *et al.*, v. Louisville & Nashville Railroad Company, *et al.*, involving switching arrangements at the City of Nashville; and, also, to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said order of the Interstate Commerce Commission pending the application for said interlocutory injunction. And they ask that a time and place for hearing said application be fixed so that at least five days' notice of said hearing may be given to defendants.

When, upon consideration thereof, the court is pleased to order and decree that the said application for a restraining order and the said application for an interlocutory injunction will be heard before the judge of this court and two other judges whom he may call to his assistance, in accordance with the statute in such case made

and provided, in the Federal Building, in Nashville, Tenn., on Monday, April 19, 1915, at nine o'clock A. M., provided that notice of such hearings shall have been given as required by law.

On April 3, 1915, writs of subpoena were issued to the Marshal at Washington, D. C., for the United States and the Interstate Commerce Commission, and to the Marshal at Nashville for the City of Nashville, Traffic Bureau of Nashville and Tennessee Central Railroad Company, which, with their returns and endorsements, are as follows:

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION.

THE PRESIDENT OF THE UNITED STATES OF AMERICA—

To the United States of America and the Interstate Commerce Commission, Washington, D. C. Greeting:

You are hereby commanded and strictly enjoined to be and appear in the District Court of the United States for the Nashville Division of the Middle District of Tennessee aforesaid, at Nashville, within the time specified in the Memorandum below, to answer or otherwise defend a certain petition in equity filed in said court against you by the Louisville & Nashville Railroad, a corporation organized under the laws of the State of Kentucky and citizen and resident of such State; the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Terminal Company, corporations organized under the laws of the State of Tennessee and residents and citizens of such State, seeking an injunction, etc., against an order of the Commission and to do further and receive what the said District Court shall consider in that behalf. And this you are in no wise to omit, under the pains and penalties of what may befall therein.

WITNESS the HONORABLE EDWARD T. SANFORD, Judge of the said District Court, and the seal thereof, at Nashville, this third day of April, A. D. 1915, and in the 139th year of the Independence of the United States of America.

H. M. DOAK, *Clerk*,
By F. B. MCLEAN,
Deputy Clerk.

SEAL.

MEMORANDUM.

Under Sec. 209, Hopkin's Judicial Code, the said defendants are required to file their answer or other defense in the clerk's office of said court on or before the thirtieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken *pro confesso.* (Equity Rule 12.)

Endorsed:

No. 30, Equity.

United States District Court,
Middle District of Tennessee,
Nashville Division.

Louisville & Nashville R. R. Co., et al., v. United States, et al. Returnable by the Marshal into the Clerk's office within twenty days from the issuing thereof. (Equity, Rule 12.) H. M. Doak, Clerk. Issued April 3, 1915. H. M. Doak, Clerk.

Filed April 12, 1915,
H. M. Doak, Clerk,
By E. L. Doak, D. C.

MARSHAL'S RETURN THEREON.

United States of America,
Middle District of Tennessee.

I hereby certify that I received the within writ of subpoena at Washington City in the District of Columbia on the 5th day of April, 1915, and made service thereof at Washington City, in the District of Columbia on the 6th day of April, 1915, by delivering a copy thereof personally to Thomas W. Gregory, Attorney General of the United States of America and to the Interstate Commerce Commission by service on Alfred Holmead, Acting Secretary of said Commission, and filed with and delivered to the Department of Justice through the Attorney General and with the Interstate Commerce Commission, Washington, D. C., printed copies of the petition and Exhibits 1, 2 and 3 thereto, as filed with the clerk of the United States District Court at Nashville, Tennessee.

Maurice Splain, *U. S. Marshal,*
By W. B. Robison,
Chief Deputy Marshal.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION.

THE PRESIDENT OF THE UNITED STATES OF AMERICA—

To the City of Nashville, Traffic Bureau of Nashville, Tennessee, Central Railroad Co., corporations organized and existing under the laws of the State of Tennessee, each with its place of business in the City of Nashville. Greeting:

You are hereby commanded and strictly enjoined to be and appear in the District Court of the United States for the Nashville Division of the Middle District of Tennessee aforesaid, at Nashville within the time specified in the Memorandum below, to answer or otherwise defend a certain petition in equity filed in said court against you by the Louisville & Nashville Railroad Co., a corporation organized under the laws of the State of Kentucky, and citizen and resident of such State; the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Terminal Company, corporations organized under the laws of the State of Tennessee and residents and citizens of such State, seeking an injunction, etc., against an order of the Commission and to do further and receive what the said District Court shall consider in that behalf. And this you are in no wise to omit, under the pains and penalties of what may befall therein.

WITNESS the HONORABLE EDWARD T. SANFORD, Judge of the said District Court, and the seal thereof, at Nashville, this third day of April, A. D. 1915, and in the 139th year of the Independence of the United States of America.

H. M. DOAK, *Clerk*,
By F. B. MCLEAN,
Deputy Clerk.

SEAL.

MEMORANDUM.

Under Sec. 209, Hopkin's Judicial Code, the said defendants are required to file their answer or other defense in the Clerk's office of said court on or before the thirtieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken *pro confesso.* (Equity, Rule 12.)

Endorsed:

No. 30. In Equity.

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION.

Louisville & Nashville R. R. Co., et al., v. United States of America, et al. Returnable by the Marshal into the Clerk's office within twenty days from the issuing thereof. (Equity, Rule 12.) H. M. Doak, Clerk.

Issued April 3, A. D. 1915. H. M. Doak, Clerk.

MARSHAL'S RETURN THEREON.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF TENNESSEE.

I hereby certify that I received the within writ of subpoena at Nashville in Davidson County, Tennessee, on the 3d day of April, 1915, and made service thereof at Nashville, in Davidson County, Tennessee, on the 3d and 5th day of April, 1915, by delivering a copy thereof personally to T. M. Henderson, Com. for Traffic Bureau, Hilary E. House, Mayor of the City of Nashville, Tennessee, W. K. McAlister, Receiver for Tenn. Central R. R. and delivering copy of petition and Exhibits Nos. 1, 2, 3, thereto to each of above parties. Returning exact copies of same to H. M. Doak, Clerk, United States District Court.

JONAS T. AMIS, *U. S. Marshal,*
By JOHN C. ADAMSON,
Deputy Marshal.

The following notice of said order was returned with endorsements thereon showing acknowledgments of service.

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

NOTICE OF HEARING OF APPLICATION FOR INTERLOCUTORY INJUNCTION AND TEMPORARY RESTRAINING ORDER.

The defendants, the United States of America, through the Attorney General of the United States, the Interstate Commerce Commission, City of Nashville, Traffic Bureau of Nashville, and Tennessee Central Railroad Company, are hereby notified that on Monday, April 19, 1915, at or about the hour of nine o'clock A. M., in the Federal Building in Nashville, Tennessee, a hearing will be held of plaintiffs' application to the United States District Court for the Middle District of Tennessee, and the judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction suspending and enjoining the enforcement, operation and execution of the order of the Interstate Commerce Commission referred to in the petition herein, being the order entered on February 1, 1915, in the proceeding lately pending before said Commission, docketed as No. 6484, and entitled City of Nashville, *et al.*, v. Louisville & Nashville Railroad Comapny, *et al.*, involving switching arrangements at the City of Nashville; and, furthermore, to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said order of the Interstate Commerce Commission, pending the application for said interlocutory injunction.

This notice is given pursuant to law and to the requirement of the following order of the said court entered herein on April 2, 1915, to-wit:

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

This cause came on to be heard on the 2d day of April, 1915, before the court upon plaintiff's application for an interlocutory injunction and temporary restraining order, as follows:

Come the plaintiffs, Louisville & Nashville Railroad Company, Nashville & Chattanooga Railway, Louisville & Nashville Terminal Company, by counsel, and, upon the grounds set out in the petition herein, hereby make application to the United States District Court for the Middle District of Tennessee, and the judges thereof, to grant and issue in this suit, to continue during its pendency, an interlocutory injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission referred to in the petition herein, being the order entered on February 1, 1915, in the proceeding lately pending before said Commission, docketed as No. 6484, and entitled City of Nashville, *et al.*, v. Louisville & Nashville Railroad Company, *et al.*, involving switching arrangements at the City of Nashville; and, also, to grant and issue a temporary restraining order staying and suspending the enforcement, operation and execution of said order of the Interstate Commerce Commission pending the application for said interlocutory injunction. And they ask that a time and place for hearing said application be fixed so that at least five days' notice of said hearing may be given to defendants.

When, upon consideration thereof, the court is pleased to order and decree that the said application for a restraining order and the said application for an interlocutory injunction will be heard before the judge of this court and two other judges whom he may call to his assistance, in accordance with the statute in such case made and provided, in the Federal Building, in Nashville, Tenn., on Monday, April 19, 1915, at nine o'clock A. M.,

provided that notice of such hearings shall have been given as required by law.

This April 5, 1915.

H. L. STONE,
W. A. COLSTON,
R. WALTER MOORE,
F. W. GWATHMEY,
EDWARD S. JOUETT,
Solicitors for Plaintiffs.

Service of this notice accepted this April 6, 1915.

A. G. EWING, JR., *for City of Nashville, Tenn.*
A. G. EWING, JR., *for Nashville Traffic Bureau.*
WALTER STOKES, *Attorney for Tennessee Central R. R. Co.*

The following appearance of the Interstate Commerce Commission was filed April 19, 1915:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - *Plaintiffs,*

versus No. 30-E.

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

The Interstate Commerce Commission hereby enters its appearance in the above-numbered and entitled cause.

INTERSTATE COMMERCE COMMISSION,
By JOSEPH W. FOLK,
EDWARD W. HINES,
Counsel for the Interstate Commerce Commission.

Said appearance is endorsed:

Filed April 19, 1915. H. M. Doak, Clerk, by E. L. Doak, Deputy Clerk.

On April 19, 1915, the following order was entered passing the cause:

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

versus No. 30, Equity.

UNITED STATES OF AMERICA.

Came the parties in proper person and the cause coming on to be heard upon the motion for injunction, etc., and by consent of parties the cause is passed for hearing until tomorrow morning.

McCALL,
U. S. District Judge.

Approved for entry this April 19, 1915. Entered Equity Journal A, page 145.

On Nov. 9th as of April 20, 1915, the Interstate Commerce Commission filed the following motion to dismiss and answer:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, AND THE
LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Plaintiffs,*

versus No. 30, Equity.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE,
TRAFFIC BUREAU OF NASHVILLE, AND
TENNESSEE CENTRAL RAILROAD COMPANY, - *Defendants.*

MOTION TO DISMISS, AND ANSWER OF THE INTERSTATE COMMERCE COMMISSION.

The defendants, City of Nashville and Traffic Bureau of Nashville, move to dismiss the petition herein and for cause say:

That the petition herein does not present a justiciable issue triable by this court, in that it does not appear that the Interstate Commerce Commission was without jurisdiction under the act to regulate commerce to enter the order referred to in the petition; or that said Commission did not grant a full hearing to the parties before the entry of said order; or that there was any irregularity in the proceeding before said Commission prior to the entry of said order; or that there was no substantial evidence to support said order; nor does the petition set forth any or sufficient facts to show confiscation of the property of plaintiffs or any of them, or any other violation of the constitutional rights of the plaintiffs entitling them to the relief or any part thereof prayed for.

I.

For answer to the petition these defendants admit that the plaintiffs are corporations as alleged in their petition, and that on January 17, 1914, defendants, the City of Nashville and the Traffic Bureau of Nashville, filed a complaint with the Interstate Commerce Commission, of which Exhibit A, filed with said petition, is a copy; that answers were filed, a formal hearing had, and a report and order made by the Interstate Commerce Commission, all as alleged in said petition, and a copy of said report and order are filed herewith as part hereof, marked "Exhibit A."

II.

These defendants deny that said order or any part thereof is arbitrary, illegal, null, or void, or without evidence to support the same, and deny that the Interstate Commerce Commission was or is without jurisdiction, power, or authority in law to make or enforce said order, and deny that said order is arbitrary or unsupported by substantial evidence, or was made because of a mistake of law. These defendants further deny that said order is in violation of the act to regulate commerce, that it is impossible of compliance or is confiscatory, or that it takes plaintiffs' property without due process of law or denies to them the equal protection of the laws.

III.

For further answer herein these defendants deny that any fact stated in plaintiff's petition which is or was essential to support the order of the Interstate Commerce

Commission attacked herein was not established by substantial evidence in the proceeding, in which said order was entered, and deny that the facts alleged in said petition to show that said order is void, or that any of said facts were, if material for that purpose, supported by uncontradicted or undisputed evidence in said proceeding.

IV.

For further answer herein these defendants deny that all or any of the facts appearing in the record or the facts specifically admitted in the report of the Interstate Commerce Commission show that the plaintiffs do not switch for each other either competitive or non-competitive traffic, and deny that any of the facts which are alleged in the petition to show that plaintiffs do not switch for each other, either competitive or non-competitive traffic, were or are uncontradicted in said record, except such of said facts as are wholly immaterial and do not have any bearing on said question. These defendants further deny that the finding in said report that the plaintiffs switch for each other is contrary to the indisputable character of the evidence or is unsupported by any evidence, and deny that the order based thereon is illegal, arbitrary, or void.

V.

For answer to the fourth paragraph of plaintiffs' petition these defendants deny that the finding of the Interstate Commerce Commission, that the plaintiffs switch both competitive and non-competitive traffic for each other at Nashville at a charge equal to the costs of service, exclusive of fixed charges, is an arbitrary finding or is wholly unsupported by any evidence or is disproved by all the evidence in this case. For further answer to said paragraph these defendants deny that any finding which it made is arbitrary or unsupported by evidence and deny that said order is confiscatory or that the enforcement of same will take plaintiffs' property without fair or just compensation in violation of the fifth amendment to the Constitution of the United States.

VI.

For answer to the fifth paragraph of plaintiffs' petition these defendants deny that any portion of said order is impossible of compliance, and deny that unless an interlocutory injunction be issued herein great or irrepar-

able injury will result to plaintiffs or that plaintiffs will suffer heavy loss of road-haul service to the Tennessee Central Railroad and its connections or will otherwise be caused great loss, expense, or inconvenience.

VII.

Further answering, these defendants say that the Interstate Commerce Commission had full jurisdiction over the matters in controversy before it; that the jurisdiction as to said matters is primary and exclusive, and that said conclusions of fact in said matters in controversy are final and conclusive upon the plaintiffs, and each of them and that the plaintiffs are in duty bound to obey said order. These defendants further state that the allegations of said petition other than those herein admitted or denied tender issues which this court has no power to determine, and, therefore, these defendants neither admit nor deny said allegations.

And having fully answered said petition, these defendants pray to be hence dismissed with its reasonable costs and charges in their behalf expended.

A. G. EWING, JR., & F. M. GARARD,
Counsel for City of Nashville, Tennessee.
Traffic Bureau of Nashville.

CITY OF NASHVILLE,
DAVIDSON COUNTY.

I, H. E. Howse, on oath, depose and say that I am Mayor of the City of Nashville, and make this affidavit on behalf of said City; that I have read the foregoing answer and know the contents thereof and that the same is true, to the best of my knowledge, information and belief.

H. E. HOWSE.

Sworn and subscribed to before me, notary public within and for the Davidson County, State of Tennessee, this 20th day of April, 1915.

J. W. DASHIELL,
SEAL. *Notary Public.*

I, T. M. Henderson, on oath, depose and say that I am the Commissioner of the Traffic Bureau of Nashville, and make this affidavit on behalf of the Traffic Bureau to Nashville; that I have read the foregoing answer and know the contents thereof and that the same is true, to the best of my knowledge, information and belief.

T. M. HENDERSON.

Sworn and subscribed to before me, notary public, within and for the Davidson County, State of Tennessee, this 20th day of April, 1915.

E. L. DOAK,
Notary Public.

SEAL.

Filed April 20, 1915. H. M. Doak, Clerk.

On April 20, 1915, the United States of America filed its motion to dismiss:

IN THE DISTRICT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, AND LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Plaintiffs,*

versus In Equity, No. 30.

UNITED STATES OF AMERICA, ET AL.

MOTION TO DISMISS THE PETITION.

Comes now the United States, defendant, by its counsel, and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioners.

As grounds for this motion it is shown:

(1) The petition including the exhibits attached thereto and made a part hereof is without equity on its face and does not state any cause of action against the defendant.

(2) The report of the Interstate Commerce Commission and the order entered in pursuance thereof were made and entered after a full hearing and due notice and rest on substantial evidence adduced on the issues made by the parties and the matters and things alleged in the petition and sought to be put in issues are foreclosed by the findings of fact.

(3) The said order was legally made and duly entered. It does not contravene any constitutional limitation. It is within the constitutional and statutory authority of the Commission. It is not unsupported by testimony. It will not be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission.

Wherefore respondent prays that its said motion be sustained.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
LEE DOUGLAS,
United States Attorney, Middle District of Tennessee.

Copy filed November 9, 1915, as of April 20, 1915. H. M. Doak, Clk., by F. B. McLean, D. C.

On April 20, 1915, the Tennessee Central Railroad Company filed the following answer:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, AT NASHVILLE.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

The answer of the Tennessee Central Railroad Company to the petition filed April 2, 1915, in the above-styled cause.

Respondent for answer to so much of said petition as it deems material, answering says—

It is true this respondent, Tennessee Central Railroad Company, is a corporation organized under the laws of the State of Tennessee and owns a line of railroad from Hopkinsville, Ky., to Nashville, Tenn., and from Nashville, Tenn., to Harriman, Tenn., which is now being operated by H. B. Chamberlain and W. K. McAlister, as Receivers under orders of this court.

Respondent denies that the order of the Interstate Commerce Commission is invalid for any reason and hence denies that the plaintiffs are entitled to either a restraining order or an injunction.

Respondent had been and is now willing in connection with the plaintiffs to fully perform the order of the Interstate Commerce Commission complained of in the petition, which relates to reciprocal switching between plaintiffs and respondent in the City of Nashville, Tenn.

If, however, this honorable court should grant either a restraining order or an injunction as prayed in the petition, then and in such event respondent insists that such order or injunction should apply to this respondent as well as to plaintiffs, so that respondent should not be left in an unfair attitude of being forced to do switching for plaintiffs and they not forced to do switching for it. If this condition should arise it would result in great financial disaster to respondent.

Respondent having fully answered prays to be hence dismissed, with its reasonable costs.

TENNESSEE CENTRAL RAILROAD COMPANY,
By S. W. FORDYCE, JR.,
WALTER STOKES,
Solicitors.

Said answer was endorsed:

Filed April 20, 1915, H. M. Doak, Clerk, by N. T. Arnett, D. C.

On April 20, 1915, the plaintiffs filed the following affidavit of A. R. Smith:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD CO.,
NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y,
LOUISVILLE & NASHVILLE TERMINAL CO., - - *Plaintiffs,*

vs. No. 30. EQUITY.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE,
TRAFFIC BUREAU OF NASHVILLE,
TENNESSEE CENTRAL RAILROAD CO., - - *Defendants.*

AFFIDAVIT OF A. R. SMITH.

Affiant, A. R. Smith, states that he is a resident of Louisville, Kentucky, and that he is now and has been for the last 10 years Third Vice President of the Louisville & Nashville Railroad Company; that as said Third Vice President he is in charge of all of the traffic of the Louis-

ville & Nashville Railroad Company, and of the traffic arrangements between the Louisville & Nashville Railroad Company and other transportation lines; that he is familiar with the traffic affairs of the Louisville & Nashville Railroad Company and with the traffic relations of that company with other lines, and that he is particularly familiar with the conditions which surround the handling of traffic into and out of Nashville, Tennessee, by the Louisville & Nashville Railroad Company and its connections, on the one hand, and by competing lines of railroad, on the other hand. Affiant's experience in traffic affairs of southeastern railroads has extended over a period of 25 years, and his knowledge of the traffic affairs of the Louisville & Nashville Railroad Company and its competitors enables him to make reasonably correct estimates of the effect upon the traffic of the Louisville & Nashville Railroad Company of establishing a switching arrangement with the Tennessee Central Railroad Company, at Nashville, Tennessee, as contemplated in the order of the Interstate Commerce Commission in issue in this case.

By the term "competitive traffic" as used or referred to by affiant in this affidavit is meant that traffic which the Louisville & Nashville Railroad Company now handles or may hereafter handle into or out of Nashville, West Nashville, East Nashville, South Nashville, or other points in the Nashville Terminals which could be handled into or out of said Terminals by some other line of railway, and by traffic competitive with the Tennessee Central Railroad is meant that traffic which is now handled or may be handled into or out of the Nashville Terminals by the Louisville & Nashville Railroad Company which might be handled by the Tennessee Central and its connections.

For brevity, in this affidavit, affiant will hereafter refer to business handled into or out of Nashville, West Nashville, East Nashville, South Nashville or other points in the Nashville Terminals as business handled into or out of Nashville.

The numbers of carloads of competitive freight received and forwarded by the Louisville & Nashville Railroad Company at Nashville during the months of September, 1913, and March, 1914, together with the aggregate amounts of gross freight revenue derived by the Louisville & Nashville Railroad Company therefrom, and the average amounts of gross revenue per car, were as follows:

	Received	Forwarded
Number of cars	2,590	2,550
L. & N. gross revenue	$134,992.00	$89,370.00
Average gross earnings per car	52.12	35.04

Said months are fairly representative months, and based upon the business for those months the volume of competitive traffic received and forwarded by the Louisville & Nashville Railroad Company at Nashville, Tennessee, for one year, is as follows:

	Received	Forwarded
Number of cars	15,540	15,300
L. & N. gross revenue	$809,954.00	$536,220.00

These figures include carload freight traffic handled at all side tracks, including public team tracks, and also those tracks which are served both by the Louisville & Nashville Railroad Company and the Tennessee Central Railroad Company. In affiant's opinion, the volume of business handled at side tracks which are served both by the Tennessee Central and the Louisville & Nashville, and the volume of business handled at public team tracks combined will not exceed 25 per cent of the total stated for all of the competitive carload traffic. Accordingly, affiant says that the carload competitive freight traffic handled into and out of Nashville by the Louisville & Nashville Railroad Company at industrial tracks now served by the Louisville & Nashville Railroad Company and not served by the Tennessee Central, and excluding any business handled on team tracks, is annually at least in the following amounts:

	Received	Forwarded
Number of cars	11,655	11,475
L. & N. gross revenue	$607,465.00	$402,165.00

Affiant has caused to be made a close investigation of the volume of competitive traffic handled into and out of Nashville by the Tennessee Central originating at or taking delivery on side tracks served by it exclusively. In conducting this investigation, inquiry was made of shippers and receivers of freight located on side tracks so exclusively served by the Tennessee Central and the results of this inquiry were checked against records prepared by affiant's solicitation force at Nashville, and the results arrived at from the two sources were in very close approximation. Said investigation shows, and affiant believes that the competitive traffic of the Tennessee Central Railroad Company received at and for-

warded from Nashville at tracks served exclusively by the Tennessee Central amounts annually to 2,484 cars received and 480 cars forwarded, or to an aggregate of 2,964 cars per annum, both forwarded and received.

If the Louisville & Nashville Railroad Company were to handle all of this business and were to make the same average earnings per car as it made on the business which it did actually handle, the gross revenue resulting therefrom to the Louisville & Nashville Railroad Company would be as follows:

On business received	$129,466.00
On business forwarded	16,819.00

Assuming 305 working days per annum, the average daily movement of competitive traffic handled into and out of Nashville by the Louisville & Nashville Railroad Company is as follows:

Competitive cars received daily	51
Competitive cars forwarded daily	50

And the competitive traffic received and forwarded by the Tennessee Central Railroad Company is as follows:

Competitive cars received daily	8
Competitive cars forwarded daily	1.5

The volume of the competitive traffic handled into and out of Nashville by the Louisville & Nashville Railroad Company that would be available for possible handling by the Tennessee Central Railroad in the event reciprocal switching is enforced at Nashville will not be less than 95 per cent of the whole volume of competitive traffic handled into and out of Nashville by the Louisville & Nashville Railroad Company; that is to say, at least that proportion of the total competitive traffic of the Louisville & Nashville Railroad Company is capable of being satisfactorily handled via Harriman and Emory Gap, Tennessee, at the eastern end of the Tennessee Central and via Hopkinsville, Kentucky, at the western end of said line.

Affiant is of the opinion that the throwing open of the Nashville Terminals so as to permit the routing via the Tennessee Central Railroad of competitive traffic originating at or having delivery on said terminals, as is contemplated by the order of the Interstate Commerce Commission in issue in this case, will cause a loss of not less

than 25 per cent of the competitive traffic received by the Louisville & Nashville Railroad Company at industrial tracks (exclusive of team tracks and tracks served jointly with the Tennessee Central) at Nashville and a loss of not less than 15 per cent of the competitive traffic forwarded by the Louisville & Nashville Railroad Company from industrial tracks (exclusive of team tracks and tracks served jointly with the Tennessee Central) at Nashville; that is to say, the annual losses on competitive business resulting to the Louisville & Nashville Railroad Company from such arrangements will be at least, as follows:

	Received	Forwarded
Number of cars	2,914	1,721
L. & N. gross revenue	$151,866.00	$60,325.00

as a partial offset to which the Louisville & Nashville Railroad Company may expect to take away from the Tennessee Central Railroad Company the same percentages of its competitive traffic, to-wit, 25 per cent of the received competitive traffic of the Tennessee Central and 15 per cent of the forwarded competitive traffic of the Tennessee Central amounting to the following annual additions to the business of the Louisville & Nashville Railroad Company:

	Received	Forwarded
Number of cars	621	72
L. & N. gross revenue	$32,366.00	$2,523.00

That is to say, the annual net losses in cars and gross and revenue resulting to the Louisville & Nashville Railroad Company from the arrangement provided for in the order of the Interstate Commerce Commission in this case would be at least, as shown by the following table:

	Cars	Gross Revenue
Loss L. & N. to Tenn. Cent., received	2,914	$151,866.00
Loss L. & N. to Tenn. Cent., forwarded	1,721	60,324.00
Total	4,635	$212,190.00
Gain L. & N. from Tenn. Cent., received	621	$ 32,366.00
Gain L. & N. from Tenn. Cent., forwarded	72	2,523.00
Total	693	$34,889.00

Net loss L. & N. to Tenn. Cent., received	2,293	$119,500.00
Net loss L. & N. to Tenn. Cent., forwarded	1,649	57,801.00
Total	3,942	$177,301.00

The revenue losses above indicated are losses in gross operating revenues, and, in order to determine the loss in the net revenue, it is necessary to take into consideration the saving in expense, if any, which would result to the Louisville & Nashville Railroad Company from the handling of the lost traffic by the Tennessee Central Railroad. The loss to the Louisville & Nashville Railroad Company of this volume of traffic will not affect any of its taxes, interest, or other fixed charges, nor its operating expenses other than what are termed haulage or out-of-pocket costs. The plant consisting of tracks, cars, engines, depots and employes will still be there capable of handling 100 per cent of the said competitive traffic into and out of Nashville, and the only cost of which the Louisville & Nashville Railroad Company would be relieved, would be the out-of-pockets cost, or that which accrues from the actual transportation of the business and which would be saved if the business is not transported. The ratio of operating expenses, freight, to operating revenues, freight, for the entire system of the Louisville & Nashville Railroad Company, was for the fiscal year ended June 30, 1914, 77.77 per cent. This ratio is affected to a considerable extent by a very large proportion of branch line mileage, which branch lines operate under relatively high ratios of expenses, and are not used to any appreciable extent in moving the competitive traffic herein involved. Affiant believes that the operating expenses attributable to the particular competitive traffic involved in this case, including all items embraced within the term operating expenses, amount to less than would be indicated by the operating ratio for the system. And affiant believes that not more than 50 per cent of the total operating expenses represents out-of-pocket costs, or costs which could be saved if the competitive traffic in question were not handled. And affiant believes that the amount of expenses which could be saved by reason of the fact that the competitive traffic in question is not handled would not amount to more than 40 per cent of the gross revenue which would be lost with that traffic; that is to say, affiant believes that of the gross revenue losses hereinabove indicated, at least 60 per cent

would represent a net and absolute loss to the Louisville & Nashville Railroad Company; in other words, affiant believes that if the switching arrangements contemplated by the order of the Interstate Commerce Commission in issue in this case, were put into effect, the net or absolute losses to the Louisville & Nashville Railroad Company per year, would not be less than the amounts shown in the following table, to-wit:

On competitive traffic received at Nashville	$ 71,700.00
On competitive traffic forwarded from Nashville	34,680.00
On competitive traffic received and forwarded at Nashville	$106,380.00

Among the facts considered by affiant in making the estimates hereinabove stated, are the following:

The principal connections of the Tennessee Central Railroad are the Cincinnati, New Orleans and Texas Pacific Railway at Emory Gap, Tennessee, the Southern Railway at Harriman, Tennessee, and the Illinois Central Railroad Company at Hopkinsville, Kentucky.

The Cincinnati, New Orleans and Texas Pacific Railway is controlled by the Southern Railway, and is part of the Queen & Crescent System, extending from Cincinnati to New Orleans, Vicksburg and Shreveport, which Queen & Crescent System is closely allied with the Southern Railway. The Southern Railway System is the largest railroad system in the South; it controls the Mobile and Ohio Railroad, the Georgia, Southern & Florida Railway and a number of smaller companies. The aggregate mileage of the Southern Railway and allied lines is 10,171 miles.

The Illinois Central Railroad operates through Iowa, Southern Wisconsin, Illinois and in the Mississippi Valley States east of the Mississippi River, and is one of the strongest lines operating in the southern section of the United States. There are 6,141 miles of road in this system.

The traffic resources and influences of these two great systems are enormous, and they are necessarily formidable competitors.

In some instances, the complete interests of the Southern Railway and its allied lines in handling traffic to and from Nashville, are centered in the route of the Tennessee Central Railroad. In almost all other instances the major interests of said roads, in the handling of traffic which

they may control or can secure by solicitation, are in the use of the Tennessee Central's route to and from Nashville, because such route gives them the longest hauls and the maxima of revenue, as opposed to routes through Chattanooga, Atlanta, Birmingham and other junction points. The instances where the use of other routes than that via the Tennessee Central Railroad will pay to the Southern Railway and its allied interests as great a revenue as can be secured by them through the Harriman or Emory Gap, Tennessee Central Route, are inconsiderable.

The situation is substantially the same with respect to the major portion of the traffic originated, controlled, or influenced by the Illinois Central System, which can use the route via Hopkinsville and the Tennessee Central to the best advantage.

To conduce to a better understanding of what this competition of the Tennessee Central Railroad and its strong connecting lines will mean to the Louisville & Nashville Railroad Company, the following details are stated as examples:

At Cincinnati and Lexington, the Cincinnati, New Orleans & Texas Pacific Railway is just as strong locally and in its favor and connections as is the Louisville & Nashville Railroad Company; it will work traffic exclusively via Emory Gap.

The Southern Railway at Louisville, through its terminal arrangements, is able to reach numerically more industries than are on the Louisville & Nashville Railroad individually, and while the Louisville & Nashville Railroad Company can reach the majority of the terminals that the Southern Railway reaches, nevertheless the Southern Railway has a very strong following in that city, and it will work the business which it can control, exclusively via Emory Gap. At Shelbyville, Versailles, Midway, Paris, Maysville, Richmond, Nicholasville, Winchester, Georgetown, Frankfort, Junction City, and other Kentucky towns, the Southern Railway, and the Cincinnati, New Orleans and Texas Pacific Railway, either directly or in connection with other railroads, can actively compete for business to Nashville, which these lines will work exclusively via Emory Gap.

At Evansville, Ind., and Henderson and Owensboro, Kentucky, the Illinois Central is approximately in as advantageous position as is the Louisville & Nashville Railroad, and will work Nashville Traffic exclusively via Hopkinsville.

At Evansville, too, the Southern Railway is able to compete and will work exclusively via Emory Gap.

At St. Louis, Mo., East St. Louis and Belleville, Illinois, the Illinois Central Railroad is fully as prominent as is the Louisville & Nashville Railroad, and while it has a route via Martin, its better paying route is via Hopkinsville. At any rate it will not work any traffic from or to these points via the Louisville & Nashville Railroad. The Southern Railway will also compete for the business to and from the St. Louis group and will work such business exclusively via Emory Gap.

At Memphis, where the Illinois Central Railroad is preponderantly strong, its exclusive route is in connection with the Tennessee Central Railroad via Hopkinsville. For all points south of Memphis on the Illinois Central System, including the Yazoo and Mississippi Valley Railroad, while it has routes in connection with the Louisville & Nashville Railroad through Memphis and Milan, its long haul and better revenue routes is via Hopkinsville.

The Louisville & Nashville Railroad Company competes with the Southern Railway at Decatur, Florence, Sheffield, Tuscumbia, Attalla, Gadsden, Alabama City, Talladega, Calera, Birmingham, Bessemer, Ensley, Selma and Mobile, Ala., Knoxville, Tenn., Jellico, Tenn., and Middlesboro, Ky.

While at some of these places the Louisville & Nashville Railroad is the stronger, at others the Southern Railway holds the advantageous position. Taking them as a whole, the strength of the two lines is about equal. The Southern Railway territory surrounding these junctions is now open to Louisville & Nashville routing through some of the latter's main line junctions. Divisions are also in effect via the Southern Railway to and from these cities themselves. For instance, there are routes between Selma and Nashville via Birmingham and via Calera. Gadsden, Anniston, Talladega and Mobile traffic is open for Louisville & Nashville routing through Birmingham, in connection with the Southern Railway. The maximum revenue, in all instances, can, however, be obtained by the Southern Railway, if routing is through Harriman in connection with the Tennessee Central R. R. At New Orleans, the Louisville & Nashville competes with the New Orleans & Northeastern R. R. (a part of the Queen & Crescent System) and with the Illinois Central System.

Aside from its single long haul, the Louisville & Nashville Railroad is now able to also compete in connection with the Queen & Crescent through Birmingham, and in

connection with the Illinois Central R. R. through Memphis and Milan. It is to the interest of the Queen & Crescent, however, to favor its lines north of Birmingham as far as Emory Gap, Tenn., in connection with the Tennessee Central, instead of the Louisville & Nashville R. R. north of Birmingham, with the traffic which it may control. In the same way, every incentive of the Illinois Central is against its giving up traffic it may control, to the Louisville & Nashville at Memphis or Milan, and to the prejudice of its further haul north of these gateways as far as Hopkinsville.

The Southern Railway, Queen & Crescent, and Illinois Central Systems all have more or less strong working interests with connections, respectively, which are also connections of the Louisville & Nashville. They will be able to influence said connections to permit them to handle for their long hauls, respectively, through Emory Gap, Harriman, or Hopkinsville, traffic given them, instead of giving it up to the Louisville & Nashville Railroad.

It is a matter of common knowledge that the Nashville Terminal Company, which supplies virtually all the terminal facilities of the Tennessee Central R. R. in the city of Nashville is owned, not by that line, but by the Illinois Central and Southern Railway, jointly or severally, which fact we may assume lends strongly to the interest those lines each may have in routing traffic via the Tennessee Central Railroad.

The Illinois Central R. R. employs, in various capacities, as freight solicitors, 89 subordinate officials. The Southern Railway, proper, 166 (this does not include the Southern Railway allied interests). The Queen & Crescent System employs 55 freight solicitors. The Tennessee Central R. R., 13. The aggregate of these four is 323. The Louisville & Nashville employs 76 freight solicitors, of various ranks, and the Nashville, Chattanooga & St. Louis Railway, 44, or an aggregate of 130.

Should reciprocal switching be practiced at Nashville, whereby the Tennessee Central R. R. will have access to all industrial side tracks on the Louisville & Nashville R. R., or those jointly controlled with the Nashville, Chattanooga & St. Louis Railway, extraordinary efforts would be put forth by the soliciting representatives and other officers of the Tennessee Central R. R., to secure as much competitive traffic as possible for and from their competitors' terminals. Inasmuch as the primary revenue interests of the Southern Railway, Queen & Crescent, and Illinois Central will be to secure as much traffic as

they can for their longer and more remunerative routes, the efforts of the Tennessee Central would be ably assisted by the numerous soliciting representatives of said lines. These combined efforts will necessarily meet with a considerable decree of success. As a rule, the "home line" always possesses a measure of strength in the good will of the shippers. The lines of the Illinois Central, Southern Railway and Queen & Crescent cover such a vast amount of territory, that there is a large volume of traffic which is originated by them or which they deliver at stations, local and competitive, reached by their lines. Shippers and receivers on these lines can be much more readily reached by the agents and representatives of said lines, for the purpose of soliciting their traffic or influencing them, than by the representatives of the Louisville & Nashville R. R. or the Nashville, Chattanooga & St. Louis Railway. Shippers and receivers located on the tracks of the latter lines at Nashville, mostly entertain friendly sentiments towards their home lines, nevertheless they are all susceptible to solicitation, and while the representatives of the Louisville & Nashville R. R., as to its shippers hope to continue to receive the major share of their traffic, even under a reciprocal arrangement, we are bound, under the most favorable conditions, to lose a proportion of it.

The estimate hereinabove is based purely on what affiant believes will be the results of the efforts and the serving of separate interests of the principal connections of the Tennessee Central, and takes no account of the influence which ownership of securities in the Tennessee Central by the City of Nashville may have on the situation. The policy of the Nashville City Government has been to use all influence it may have with the shippers and receivers of freight at Nashville to favor the Tennessee Central, because of this ownership, proclamations urging this as a duty on the citizens of Nashville having been made by the Mayor. Should all of the shippers and receivers located on the Louisville & Nashville Railroad served tracks at Nashville accept this advice of the city authorities, 100 per cent of the Louisville & Nashville Railroad's traffic available to competition of the Tennessee Central will be jeopardized. When the city government at Nashville makes contracts for commodities for which the Tennessee Central may compete, they usually specify routing over the Tennessee Central Railroad.

(Signed) A. R. SMITH.

State of Tennessee,
County of Davidson. } Sct.

Subscribed and sworn to before me, W. E. McFarland, a Notary Public, in and for the aforesaid county and State, by A. R. Smith, this, the 19th day of April, 1915.

W. E. McFARLAND, *Notary Public.*
Davidson County, Tennessee.

Notary Seal.

Said affidavit was endorsed:

Filed April 20, 1915. H. M. Doak, Clerk.

On April 20, 1915, the plaintiffs filed the following affidavit of Charles Barham:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD CO.,
NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y,
LOUISVILLE & NASHVILLE TERMINAL CO., - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE,
TRAFFIC BUREAU OF NASHVILLE,
TENNESSEE CENTRAL RAILROAD CO., - - *Defendants.*

I, Charles Barham, make affidavit as follows:

I am forty-eight years of age, reside in Nashville, Tennessee, and have been for the past nine years, General Freight Agent of the Nashville, Chattanooga & St. Louis Railway, and for the past sixteen years have been connected with the Traffic Department of that company in various capacities as Chief Clerk, Assistant General Freight Agent, and General Freight Agent.

I am familiar with the traffic of the Nashville, Chattanooga & St. Louis Railway, with local conditions in the city of Nashville, and with the relations existing between

the Nashville, Chattanooga & St. Louis Railway and its various rail connections. This knowledge enables me to form a reasonably accurate idea of the probable effect upon the traffic of the Nashville, Chattanooga & St. Louis Railway in the event a reciprocal switching arrangement should be made at Nashville, Tennessee, between the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad, as contemplated by the order of the Interstate Commerce Commission in its opinion dated February 1, 1915.

I am of the opinion that a reasonable estimate of the loss to the Nashville, Chattanooga & St. Louis Railway caused by such an arrangement would be twenty per cent of its inbound competitive traffic, and ten per cent of its outbound competitive traffic. By "competitive" is meant that traffic which the Nashville, Chattanooga & St. Louis Railway now hauls into or out of Nashville and West Nashville, Tenn., which could be handled into or out of Nashville or West Nashville by some other line of railway.

Exclusive of freight loaded or unloaded from team tracks, the Nashville, Chattanooga & St. Louis Railway handles into Nashville and West Nashville approximately fifteen thousand, one hundred (15,100) and from Nashville and West Nashville approximately seventeen thousand (17,000) carloads of "competitive" freight per annum. On all this business the approximate average earnings of the Nashville, Chattanooga & St. Louis Railway are $28.50 *per carload,* and, therefore, its total earnings on this traffic are substantially $915,000 per annum, of which approximately $485,000 is earned on business from Nashville and West Nashville, and $430,000 on business to Nashville and West Nashville.

The entire business above referred to is "competitive" in the sense herein explained as between the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad, and in the event switching arrangements are entered into, as ordered by the Interstate Commerce Commission, I am of the opinion the Nashville, Chattanooga & St. Louis Railway would lose approximately:

	Cars	Revenue
On business from Nashville and West Nashville.....	1,700	$48,500
On business to Nashville and West Nashville	3,020	86,000
Total	4,720	$134,500

After careful inquiry among the shippers located thereon, and from the best information I am able to obtain, I believe the Tennessee Central Railroad now handles for the receivers and shippers located exclusively on its terminals, approximately 450 carloads from and 2,500 carloads into the city of Nashville, or an approximate total of 2,950 carloads of competitive traffic per annum.

I am of the opinion that of the above total number of cars now handled by the Tennessee Central Railroad from and into the city of Nashville, the Nashville, Chattanooga & St. Louis Railway should, with reciprocal switching arrangements, be able to control substantially the same percentage as it would itself lose to the Tennessee Central of the business now handled by the Nashville, Chattanooga & St. Louis Railway, or twenty per cent inbound and ten per cent outbound. Should these expectations be realized, a reciprocal switching arrangement would control to the Nashville, Chattanooga & St. Louis Railway 545 carloads now handled by the Tennessee Central Railroad, on which the average earnings of the Nashville, Chattanooga & St. Louis Railway should be, as stated, $28.50 per carload, or, in round figures, $15,500. But as the Nashville, Chattanooga & St. Louis Railway would, in my opinion, lose substantially $134,500 on the business it now handles, the total loss to the Nashville, Chattanooga & St. Louis Railway because of such an arrangement would be approximately $118,000 per annum.

A review of the circumstances and conditions under which the solicitation of the Nashville, Chattanooga & St. Louis and other railways is now conducted is necessary for an appreciation of the above estimate, as, also, an understanding of the general territory which would, through the operation of a switching agreement, become competitive.

There would become competitive as between the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad all traffic now handled by the former company when originating at or beyond its junctions with other lines of railway, as follows:

Atlanta, Georgia.
Rome, Georgia.
Dalton, Georgia.
Chattanooga, Tennessee.
Gadsden, Alabama.

Attalla, Alabama.
Huntsville, Alabama.
Stevenson, Alabama.
Paducah, Kentucky.
Union City, Tennessee.
Gibbs, Tennessee.
Martin, Tennessee.
Jackson, Tennessee.
Memphis, Tennessee.

None of this traffic is at this time competitive as between the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad when shipped to or from firms and persons located on the exclusive Nashville, Tenn., Terminal of the former road, but with a reciprocal switching arrangement in force at Nashville, the Nashville, Chattanooga & St. Louis Railway would immediately meet the following additional competition which it does not now face:

At Atlanta that of the Southern Railway and Central of Georgia Railroad, both having their own rails to Chattanooga, and who would thereby be enabled to work via Chattanooga, Tenn., and Harriman, Tenn., in connection with the Tennessee Central Railroad. The earnings of both the Southern Railway and of the Central of Georgia Railroad would be substantially increased via this route as against the delivery of the traffic to the Nashville, Chattanooga & St. Louis Railway at Atlanta, Ga.

From Cartersville, Ga., the Seaboard Air Line would compete via Rockmart, Ga., Southern Railway, Harriman and the Tennessee Central.

From Rome, Ga., the Southern Railway and the Central of Georgia would compete via the route described as from Atlanta.

From Dalton, Ga., the Southern Railway would compete via the same route.

From Chattanooga, Tenn., the Cincinnati, New Orleans & Texas Pacific Railroad would compete via Harriman and the Tennessee Central Railroad.

From Gadsden and from Attalla, Ala., the Alabama Great Southern Railroad would compete via Chattanooga, Tenn., Harriman and the Tennessee Central Railroad.

From Huntsville, Ala., the Southern Railway would compete via Chattanooga, Tenn., Harriman and the Tennessee Central Railroad.

From Paducah, Ky., the Illinois Central Railroad would compete via Hopkinsville, Ky., and the Tennessee Central Railroad.

From Union City, Tenn., the Mobile & Ohio Railroad would compete via Rives, Tenn., Illinois Central Railroad, Hopkinsville, Ky., and the Tennessee Central Railroad.

From Gibbs and Martin, Tenn., the Illinois Central Railroad would compete via Hopkinsville, Ky., and the Tennessee Central Railroad.

From Jackson, Tenn., the Mobile & Ohio Railroad and the Illinois Central Railroad would compete, the one using the Illinois Central Railroad from Rives, Tenn., the other over its own rails to Hopkinsville, Ky., thence Tennessee Central Railroad.

From Memphis, Tenn., the Illinois Central Railroad would compete via Hopkinsville, Ky., and the Tennessee Central Railroad.

Not only would this additional competition be faced by the Nashville, Chattanooga & St. Louis Railway from the cities named, but also on all business from beyond passing through these junctions, and this business is of extreme importance to it; for example, such business as now comes from the west, from Chicago, St. Louis, Kansas City, Minneapolis, St. Paul, from the Pacific Coast, etc., via Cairo, Martin and the Nashville, Chattanooga & St. Louis Railway could come via Cairo, Hopkinsville, and the Tennessee Central Railroad. Moreover it would be to the immediate interest of the connections of the Nashville, Chattanooga & St. Louis Railway to use the routes via either Hopkinsville, Ky., or Harriman, Tenn., as thereby their hauls would be lengthened and earnings increased. Because of these new routes and lengthened hauls the Nashville, Chattanooga & St. Louis Railway would be compelled to face a largely increased competition with important and powerful railways by whom large soliciting forces are employed and whose methods are aggressive and thoroughly organized. Even if the Nashville, Chattanooga & St. Louis Railway could successfully withstand this added competition it would entail a severe expense for which it would receive no compensation over and above its present earnings.

In short, as will be seen, the business now delivered the Nashville, Chattanooga & St. Louis Railway at the various junction points named could be handled via the lines from which it is now received by the Nashville, Chattanooga & St. Louis Railway through other junctions yielding them longer hauls and greater revenue, to a con-

nection with the Tennessee Central Railroad either at Harriman, Tenn., or Hopkinsville, Ky. But while those diversions would entail substantial loss to the Nashville, Chattanooga & St. Louis Railway, they would be without gain to the shippers and receivers, inasmuch as the present rates of freight would not be reduced nor the present service made better thereby.

The loss estimated above, $134,500 per annum, as approximately that which the Nashville, Chattanooga & St. Louis Railway would, in my opinion, incur through the diversion from it to the Tennessee Central Railroad of business moving to and from Nashville and West Nashville, is the gross revenue of the former, and to find the actual or net loss there must be deducted therefrom the cost of handling the business.

The operating ratio, or percentage of operating cost to revenue, of the Nashville, Chattanooga & St. Louis Railway is, at this time, about seventy-nine per cent. But this operating ratio includes many items of expense which could not be reduced proportionately, if at all, should the Nashville, Chattanooga & St. Louis Railway lose to the Tennessee Central Railroad the business herein referred to. Practically the only reduction in expense possible thereby would be an amount equal to the out-of-pocket haulage cost, and this, in my opinion, is not more than thirty per cent of the revenue. So estimated the actual net loss of the Nashville, Chattanooga & St. Louis Railway on business diverted from it to the Tennessee Central Railroad would be about $95,000 and against this should be credited approximately $10,850 (70% of $15,000) profit earned on that business now handled by the Tennessee Central Railroad which the Nashville, Chattanooga & St. Louis Railway would, through the operation of a reciprocal switching agreement, likely control. Calculated as above the loss of the Nashville, Chattanooga & St. Louis Railway over and above any gain it might receive by reason of losses incurred by the Tennessee Central Railroad, would be not less than $84,150 per annum, and this I believe to be a conservative estimate, and if anything under rather than over stated.

The conditions feared by the Nashville, Chattanooga & St. Louis Railway are not those of better service or lower rates via the Tennessee Central, for neither of these will be had, but the opening of gateways via which the earnings of the present connections of the Nashville, Chattanooga & St. Louis Railway will be increased; coupled with the sentimental preference which may be expected shown by the receivers and shippers of Nash-

ville for the Tennessee Central. Many appeals to these receivers and shippers have already been made based upon the stock ownership of the city in that line and a proclamation has even been issued by the Mayor of Nashville urging the use of the Tennessee Central. These facts are well known and, I believe, of record in this case.

CHARLES BARHAM.

(SEAL.) Subscribed and sworn to before me at Nashville, Tenn., on the 19th day of April, 1915.

JIM SCOTT,
Notary Public.

Affidavit was endorsed:
Filed April 20, 1915. H. M. Doak, Clerk.

On April 20, 1915, the plaintiffs filed the following affidavit of C. C. Gebhard:

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,

vs.

UNITED STATES OF AMERICA, ET AL.

AFFIDAVIT.

Affiant, C. C. Gebhard, states that he is thirty-six years of age, that he resides in Louisville, Ky., and is the Chief Clerk of the Traffic Department of the Louisville & Nashville Railroad Company. He says that said Traffic Department has charge of the issuance and distribution of new tariffs and that, speaking from his experience, it will be necessary, if new tariffs are to be issued showing changes in the switching arrangements at Nashville, Tenn., for them to be furnished to the printer not later than April 26, 1915, in order for them to be published and filed for the use of the Interstate Commerce Commission and the public on or before June 1, 1915, the date required by the Commission's order, that is,

thirty days before June 1st, the effective date of said order.

He says that in order to make legal publication of said tariffs it will be necessary for the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to distribute them to all of their local freight agents, general division and soliciting representatives, as well as to connecting lines throughout the country generally and that he has made investigation of the lists of persons to whom these distributions will have to be made and he says that such lists include approximately 1,900 persons.

He further says that in the event a temporary restraining order is not issued herein, but that later on an interlocutory injunction should be issued, the plaintiffs would be put to the expense and labor of cancelling said new issue of tariffs and that the publication and distribution generally and particularly of these tariffs would be greatly inconvenienced and hampered because of the confusion and complications which would necessarily arise out of the issuance of the new tariffs and their early cancellation and the reissuance of the old ones.

(Signed) C. C. GEBHARD.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

Subscribed and sworn to before me by C. C. Gebhard this April 19, 1915. My commission expires July 18, 1918.

W. E. MCFARLAND.

Notary Seal.

Affidavit for plaintiff of C. C. Gebhard. Filed April 20, 1915. H. M. Doak, Clerk.

Said affidavit was endorsed:
Filed April 20, 1915, H. M. Doak, Clerk.

On April 20, 1915, the plaintiffs filed a certified copy of the record and proceedings before the Interstate Commerce Commission, which was endorsed:

Filed April 20, 1915.

Said record is not repeated here, as it is the same as the Exhibit with the Petition, and is contained in Volumes II and III of this transcript of record.

On April 20, 1915, the following order on hearing was entered:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,

vs. 30.

UNITED STATES OF AMERICA, ET AL.

The plaintiffs having filed their petition herein to enjoin the order of the Interstate Commerce Commission, in the City of Nashville, et al., v. Louisville & Nashville Railroad Company, et al., I. C. C. Docket 6484, and having made application to the Honorable Edward T. Sanford, Judge of the United States District Court for the Middle District of Tennessee for an injunction *pendente lite* and for a temporary restraining order, and for an early hearing on said application, he thereupon immediately called to his assistance to hear and determine the case, the Hon. John W. Warrington, United States Circuit Judge for the Sixth Judicial Circuit, and the Hon. John E. McCall, Judge of the District Court of the United States for the Western District of Tennessee, and fixed Monday, April 19, 1915, at 9 o'clock A. M., in the United States District Courtroom at Nashville, Tennessee, as the time and place for hearing the said application, of which due notice was given to defendants.

And thereupon on that day the said United States District Court convened and the hearing of said application was continued to April 20, 1915, at the same place at 9:30 o'clock A. M.

And thereupon the said three judges convened the United States District Court for the Middle District of Tennessee, at Nashville, Tennessee, on Tuesday, April 20, 1915, at 9:30 o'clock A. M. in pursuance of the statute in such case made and provided, all of the parties being present and represented by their respective counsel.

Thereupon came the plaintiffs and filed a certified copy of the transcript of evidence heard before the Interstate Commerce Commission, and also the affidavit of A. R. Smith, Chas. Barham and C. C. Gebhard, to which affidavits and the filing thereof, counsel for the defendants, United States of America and Interstate Commerce Commission, objected as immaterial and irrelevant and as not bearing on the power of the Interstate Commerce Commission to enter the order.

And thereupon the said cause came on for hearing on the said applications, and the same were argued by coun-

sel and submitted to the court, and taken under advisement.

Leave was granted to each and any party to file briefs within five days from the date thereof.

Entered on April 20, 1915. Equity Journal A, pages 146-7.

On September 18, 1915, the court filed the following *per curiam* opinion:

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL.,

vs. No. 30. IN EQUITY.

UNITED STATES OF AMERICA, ET AL.

Before WARRINGTON, Circuit Judge, and McCALL and SANFORD, District Judges.

PER CURIAM. The Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway Company and the Louisville & Nashville Terminal Company, hereinafter called the Louisville & Nashville, The Nashville & Chattanooga and the Terminal Company, respectively, having filed a petition against the United States, the Interstate Commerce Commission, and others, to set aside a certain order made by the Commission in the matter of the switching of competitive traffic at Nashville, Tennessee, entered a motion for an interlocutory injunction restraining the enforcement of this order *pendente lite*. This motion was heard by three judges, as provided by the Act of October 22, 1913, c. 32, 38, Stat. 228; the hearing being had upon the petition and exhibits, the answers of certain of the defendants, and affidavits filed by the petitioners on the question of irreparable injury. There were also heard motions of the United States and of the Commission to dimisss the petition, based, in substance, on want of equity upon its face.

The order sought to be enjoined was made by the Commission in proceedings instituted by the City of Nashville and its Traffic Bureau, wherein, among other things, they

complained, in effect, that the rates and practices of the Louisville & Nashville and the Nashville & Chattanooga affecting the interchange and switching of competitive car traffic at Nashville, established by agreement and concert of action among the petitioners, subjected competitive carload traffic received and delivered at Nashville from and to the Tennessee Central Railroad Company, hereinafter called the Tennessee Central, to undue and unreasonable prejudice and disadvantage, in violation of Section 3 of the Interstate Commerce Act, and prayed that they be required to desist from such violation; and for general relief. Answers having been filed and evidence taken, the Commission filed its written report, containing its findings of fact and conclusions thereon, which were, in substance: that the petitioners refuse to switch competitive traffic to and from the Tennessee Central at Nashville, upon the same terms as non-competitive traffic, while interchanging both kinds of traffic on the same terms with each other; and that, since the interchange of traffic between the petitioners' lines and the Tennessee Central does not differ substantially from the conditions of interchange between the petitioners' own lines, this is unjustly discriminatory. City of Nashville v. Louisville & Nashville Railroad Co., 33 I. C. C. 76. And thereupon the Commission issued the order in question, requiring that the petitioners should cease on or before a specified date, and thereafter abstain, from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central at Nashville on the same terms as interstate non-competitive traffic, while interchanging both kinds of traffic on the same terms with each other; and that they should, on or before such date, establish, publish and thereafter maintain and apply to the switching of interstate traffic to and from the tracks of the Tennessee Central at Nashville, rates and charges which should not be different from those which they contemporaneously maintain with respect to similar shipments from their respective tracks in such city.

The petitioners, having exhibited with their petition a transcript of all the evidence before the Commission, earnestly insist in support of their motion for an interlocutory injunction: that the conclusions of the Commission are not supported by any substantial evidence and are contrary to the indisputable character of the evidence; that, as shown by the undisputed evidence, the Terminal Company does not handle any traffic or switch any freight at all; that, as shown by the indisputable

character of the evidence, the Louisville & Nashville and the Nashville & Chattanooga do not interchange traffic with or switch traffic for each other, but each does its own switching, under a valid joint arrangement, which, in effect, merely gives them reciprocal trackage rights over each others property and is not subject to regulation by the Commission under the Interstate Commerce Act; and, further, that this arrangement is maintained under circumstances and conditions wholly dissimilar to those involved in the switching of traffic to and from the Tennessee Central and hence does not constitute discrimination. On the other hand, the defendants contend: that it appears from the petition and the testimony before the Commission exhibited therewith, that the conclusions of the Commission are supported by substantial evidence and are not contrary to the indisputable character of the evidence; that they involve no error of law; and that hence they are not subject to review by the court in this proceeding, and the injunction should accordingly be denied and the petition dismissed for want of equity upon its face.

It is well settled, on the one hand, that a conclusion of the Commission upon a question of fact, such as the reasonableness of a rate or the giving of a preference, whose correctness depends wholly upon a consideration of the weight to be given evidence before it, will not be reviewed by the court; and, on the other hand, that a conclusion which plainly involves, under the undisputed facts, an error of law, or which is shown to be supported by no substantial evidence or to be contrary to the indisputable character of the evidence, thereby likewise involving an error of law, will be so reviewed. Pennsylvania Co. v. United States, 236 U. S. 351, 361; Louisville Railroad v. United States (D. C.), 216 Fed. 672, 679 (three judges); and cases therein cited.

The material facts established by the undisputed evidence before the Commission and set forth, in the main, in its detailed findings, may be thus summarized:

Nashville is traversed and served by three railroads: The Louisville & Nashville, extending through from the north to the south; the Nashville & Chattanooga, from the west to the southeast; and the Tennessee Central, from the northwest to the east. The Louisville & Nashville and the Nashville & Chattanooga entered this city many years ago; the Tennessee Central in recent years. The Louisville & Nashville and the Nashville & Chattanooga are natural competitors for Nashville traffic; and each competes for such traffic with the Tennessee Central. All

three railroads have extensive terminals in the city, with depots, yards, and tracks; their respective tracks reaching industries located mainly in different sections of the city, but partly in the same sections. The tracks of the Tennessee Central are connected with those of the Nashville & Chattanooga by an interchange track at Shops Junction, in the western section of the city, and with those of the Louisville & Nashville by an interchange track at Vine Hill, just outside the city on the south. The tracks of the Louisville & Nashville and the Nashville & Chattanooga are connected at several points, but principally in the joint terminals operated by them in the center of the city, as hereinafter set forth. The entire situation is fully shown by a map accompanying the report of the Commission. (38 I. C. C. Sup. Opp., p. 78.)

Originally the northern and southern lines of the Louisville & Nashville had separate terminals in different sections of the city, and the Nashville & Chattanooga, a terminal midway between them; there being no track connections in the city between any of these different terminals. In 1872, by agreement between the companies, the Louisville & Nashville acquired, for the annual rental of $18,000 and other valuable considerations, perpetual trackage rights connecting its two terminals with each other and with the terminal of the Nashville & Chattanooga; this agreement also contemplating the construction of a union passenger station on the depot grounds of the Nashville & Chattanooga.

In 1880 the Louisville & Nashville began to acquire the capital stock of the Nashville & Chattanooga, and now owns slightly more than 71 per cent thereof.

In 1893, to facilitate the construction of the proposed union station and other terminal facilities, the Louisville & Nashville and the Nashville & Chattanooga caused their co-petitioner, the Terminal Company, to be organized under the general incorporation laws of Tennessee. These laws give terminal companies the right to lease their property and terminal facilities to any railroad company utilizing them, upon such terms and time as may be agreed upon by the parties. The Louisville & Nashville owns all of the capital stock of the Terminal Company.

On April 27, 1896, the Louisville & Nashville and the Nashville & Chattanooga, by separate indentures, leased to the Terminal Company for 999 years all of the property and railroad appurtenances thereon which they severally owned or controlled within or in the immediate vicinity of the original depot grounds of the Nashville & Chattanooga. In each of these leases the amount of the

stipulated rental was left blank; the Terminal Company, however, covenanting to keep the premises in repair and to pay all accruing taxes.

On June 15, 1896, the Terminal Company leased to the Louisville & Nashville and the Nashville & Chattanooga, jointly, for 999 years, all the premises acquired by it under the former leases from them, together with all other premises which it had subsequently acquired or might thereafter acquire. Under this lease the Terminal Company covenanted to construct upon the leased premises all passenger and freight buildings, tracks and other terminal facilities suitable and necessary for such railroads entering at Nashville as might contract with it therefor, and to pay all taxes and insurance upon the leased premises and the improvements to be constructed thereon; while the two railroad companies agreed to pay it annually as rental for the leased premises and the improvements thereon, 4% upon the actual cost of the acquisition of the premises and the construction of the improvements, in addition to the amount of the taxes and insurance; and further agreed to keep the leased properties in repair.

On June 21, 1898, the Terminal Company entered into a contract with the City of Nashville whereby it agreed to construct a union passenger station on the premises covered by the above-mentioned leases, with freight depots, tracks, switches, etc., and viaducts over its tracks and certain new streets and extensions of streets; the city agreeing to secure the condemnation of land, close certain streets, and erect approaches to certain of the viaducts. The Louisville & Nashville and the Nashville & Chattanooga, in consideration of the benefits to be received by them from the proposed improvements, guaranteed the performance of the obligations of the Terminal Company under the contract. This contract made no provisions for future railroads.

The improvements agreed upon, including the passenger station, depot, tracks, etc., were duly made, being completed in 1900. The tracks thus constructed by the Terminal Company are connected with those of the Louisville & Nashville and the Nashville & Chattanooga, but not with those of the Tennessee Central.

The contribution of the city to these improvements cost approximately $100,000; while the total cost of the Terminal Company was considerably in excess of two million dollars. To enable the Terminal Company to acquire the additional properties which it had purchased in addition to those leased to it by the two railroads, and

to construct these improvements, the Louisville & Nashville and the Nashville & Chattanooga from time to time advanced to it the necessary funds. To repay these advances the Terminal Company executed a mortgage securing an authorized issue of three million dollars of bonds. These bonds were guaranteed by the two railroads, under authority given by the Tennessee laws relating to terminal companies. Of these authorized bonds, $2,535,000 were actually issued, the proceeds of which were used to repay the advances made by the railroads.

During the construction of these terminal facilities the Louisville & Nashville and the Nashville & Chattanooga continued, as theretofore, to operate their respective terminals independently, under reciprocal switching arrangements, by which each switched cars for the other to and from their local destinations, at a uniform charge of $2.00 per car; this switching charge being absorbed on competitive traffic by the railroad having the transportation haul, while on non-competitive traffic it was paid by the shipper or consignee.

On August 15, 1900, shortly after the completion of the terminal facilities by the Terminal Company, the Louisville & Nashville and the Nashville & Chattanooga, being then the only two railroads entering Nashville, as a matter, primarily at least, of economy in the operation of terminal facilities, entered into an agreement under which they have since maintained and operated joint terminal facilities at Nashville, the effect of which is the underlying matter of controversy in this case. The essential provisions of this agreement are as follows:

The two railroads created an unincorporated organization, styled in the agreement the "Nashville Terminals," and hereinafter called the Terminals, for the maintenance and operation of terminals at Nashville, embracing in such organization all the properties, buildings, tracks, and terminal facilities leased to them by the Terminal Company, together with certain other individually owned tracks which they severally contributed and attached to said terminals, consisting of 8.10 miles of main and 23.80 miles of side track contributed by the Louisville & Nashville, and 12.15 miles of main and 26.37 miles of side tracks contributed by the Nashville & Chattanooga. The agreement further provided: (a) That the entire properties thus included within the terminals should be maintained and operated, as such, under the management of a Board of Control, consisting of a Superintendent of the Terminals and the General Managers of the two railroads, the operation of the Terminals to be

under the immediate control of the Superintendent, who should appoint, subject to the approval of the Board, a Station Master, Master of Trains, and other designated officers, each of whom should have a staff of employes for the conduct of his department; (b) that the expenses of maintaining and operating the Terminals should be apportioned between the two railroads as follows: passenger service expenses (including all expenses of the union passenger station) in proportion to the number of passenger train cars and locomotives handled by the Terminals for each; siding expenses (to be ascertained on the basis of the number of hours that yard engines were engaged in switching to and from house and private sidings, and bulk or team tracks, as compared with the total number of hours that they were engaged in all classes of service) in proportion to "the total number of cars placed on and withdrawn from house and private sidings, bulk or team tracks (by the Terminals) for each" railroad; train yard expenses, in proportion to the number of all cars and train locomotives received and forwarded by the Terminals for each; and general expenses, in proportion to the average percentages of the three other expense accounts; provided, that before such apportionment of expenses, there should be deducted from the aggregate expenses all moneys received by the Terminals for room rents, restaurant and news-stands privileges, etc., and services rendered any other persons; (c) that the separate freight stations and appurtenant tracks of each railroad and the tracks allotted to each for receiving and delivering bulk freights, should be maintained and operated by the Terminals for each of them direct, and the expenses thereof charged directly to each; a like provision being made in reference to the operation of the terminal roundhouse for the Louisville & Nashville alone; (d) that each railroad should set apart and allot to the use of the Terminals, switching engines adequate to the work of switching and pulling trains in and about the Terminals, corresponding in efficiency to the proportion of work performed for each; which should be maintained and kept in repair by the Terminals and for which it should pay the railroads four per cent annually upon their valuation at the time of allotment; and (e) that the rights, privileges and uses of all the property in the Terminals by the respective railroads, should be "the same, equal and joint, and none other," except only as to the bulk tracks, etc., operated for each separately.

In operating under this agreement all the work of breaking up incoming freight trains of both railroads

after they come into the central yards of the Terminals, and of collecting and making up outgoing freight trains for both railroads before they leave such yards, is performed by the Terminals. Thus, when an incoming freight train comes in on the line of either railroad into the central yards, all cars destined for industries located within the Terminals, either on the tracks jointly leased to the Terminal Company or on the tracks of either railroad otherwise included within the Terminals, are switched by the Terminals to such local destination, without distinction as to the particular tracks on which such industries are located; and, conversely, freight cars loaded at industries located on any of such tracks for transportation out of Nashville on the line of either railroad, are switched by the Terminals to the central yards and made up into the outgoing train. In other words, the entire switching service in reference to either the incoming or the outgoing freight trains of each railroad to and from the separate and joint tracks of both railroads, is performed by the Terminals, acting as joint agent of the two railroads under the Terminal agreement. However, in accordance with this agreement, the only direct charge for such switching service is, in effect, made against the railroad having the transportation haul, in accordance with the provision that the siding expenses shall be apportioned between the two railroads in proportion to "the total number of cars placed on and withdrawn from house and private sidings, bulk and train tracks, for each of the parties." Obviously, however, this apportionment of siding expenses does not represent the entire actual cost incident to the switching services, as it does not include any part of the general expenses and fixed charges of the Terminal, which are apportioned between the two railroads upon a different basis, as provided by the agreement.

The interchange track between the Nashville & Chattanooga and the Tennessee Central at Shops Junction is within the switching limits of the Terminals under this agreement, but the interchange track between the Louisville & Nashville and the Tennessee Central at Vine Hill is outside of these switching limits.

On December 3, 1902, the Terminal Company, the Louisville & Nashville, and the Nashville & Chattanooga entered into an agreement, reciting that the two leases of April 27, 1896, from the railroads to the Terminal Company had been cancelled and abrogated; modifying the lease of June 25, 1896, from the Terminal Company to the railroads, so that thereafter it should only include

certain tracks and parcels of land that had been directly acquired by the Terminal Company, and should be otherwise rescinded and abrogated and the properties of the railroads otherwise respectfully restored as they were prior to the lease, subject only to the mortgage that had been executed thereon by the Terminal Company to secure its issue of bonds; reducing the term of the lease to 99 years; and modifying in certain respects the provisions of the lease as to the rental to be paid.

The Terminal tariffs of both railroads publish service by the Terminals and provide that "there is no switching charge to or from locations on tracks of the Nashville Terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville" over either railroad, "regardless of whether such traffic is from or destined to competitive or non-competitive points."

The Tennessee Central entered Nashville in 1901-2, after strong opposition from the Louisville & Nashville, and leased its terminal facilities, consisting of a passenger station, freight depots, tracks, etc., from another Tennessee railroad terminal corporation that had been organized in 1893.

Prior to 1907 neither the Louisville & Nashville or the Nashville & Chattanooga would interchange traffic with the Tennessee Central at Nashville or any other point of connection. In that year, however, they both began to interchange with the Tennessee Central at Nashville all non-competitive traffic, exclusive of coal traffic, at the rate of $3.00 per car; non-competitive Nashville traffic being defined as traffic between Nashville and points reached only by one railroad into Nashville or points served by two or more railroads into Nashville for which, however, one railroad can maintain rates which the others can not meet. This interchange of non-competitive traffic between both the Louisville & Nashville and the Nashville & Chattanooga was and is effected by the connection between the Tennessee Central and the Nashville & Chattanooga at Shops Junction, there being no direct connection between the Tennessee Central and the Louisville & Nashville.

On December 9, 1913, upon complaint by the City of Nashville and others, the Commission found that the Louisville & Nashville and the Nashville & Chattanooga switched all traffic for each other at Nashville but refused to switch coal to and from the Tennessee Central except at a prohibitive rate, thereby unjustly discriminating against coal to and from the Tennessee Central in favor of coal to and from each other's lines, and entered an

order requiring the Louisville & Nashville and the Nashville & Chattanooga to abstain from maintaining any different practice with respect to switching interstate carload shipments of coal from and to the Tennessee Central at Nashville from that maintained with respect to similar shipments from and to their respective tracks. The Louisville & Nashville and the Nashville & Chattanooga thereupon filed a petition in this court seeking to restrain the execution of this order and applied for an interlocutory injunction, which was denied by this court. Louisville Railroad v. United States (D. C.), 216 Fed. 672 (three judges). This decision was recently affirmed, on appeal, by the Supreme Court. Louisville Railroad v. United States, 238 U. S. 1. This order, however, was interpreted by both railroads as relating exclusively to non-competitive coal, and while they have since that time switched non-competitive coal to and from the Tennessee Central at $3.00 per car, the same as other non-competitive traffic, they have not changed their former practice relative to competitive coal.

A table introduced in evidence by the petitioners (33 I. C. C., at p. 83), shows the average cost to the Terminals of handling city freight traffic to be, exclusive of fixed charges, $4.128 per car. The Commission was of opinion that, while these figures might not be absolutely correct, they were not shown to be substantially incorrect, and that the charge of $3.00 per car for switching Tennessee Central non-competitive traffic was not shown to be unreasonably high; a conclusion in which we entirely concur.

The Louisville & Nashville will switch competitive coal and other competitive traffic at Nashville to and from the Tennessee Central but only at its local rates, such interchange being usually effected through the agency of the Terminals, at Shops Junction, over the rails of the Nashville & Chattanooga. For a while the Nashville & Chattanooga would in like manner perform the same switching service to and from the Tennessee Central at its local rates, its published terminal tariff of December 14, 1913, expressly providing that such local rates would apply on competitive traffic from and destined to the Tennessee Central. Since January 25, 1914, however, shortly after the complaint in this case was filed, its terminal tariff has provided that competitive traffic will not be switched to and from the Tennessee Central, and no local rate applicable thereto has been published. The terminal tariff of the Tennessee Central provides that Louisville & Nashville and Nashville & Chattanooga competitive traffic will be switched at its local rates. The local rates applied to

such switching by the Louisville & Nashville total from $12 to $36 per car; by the Nashville & Chattanooga from $7 to $36 per car; and by the Tennessee Central from $5 to $36 per car. These rates are virtually prohibitive. The Tennessee Central favors their reduction; but will not reduce its rates until the other railroads do likewise.

The cost to the Terminals of switching competitive Tennessee Central traffic is the same as the cost of switching non-competitive. The Louisville & Nashville interswitched competitive and non-competitive traffic on the same terms with other carriers at Memphis, Tenn., Birmingham, Ala., and several other points. The Nashville & Chattanooga interswitches both kinds of traffic with all other carriers at all connection points at the same rates, except with the Tennessee Central at Nashville; having had in effect at Lebanon, Tenn., where it also connects with the Tennessee Central, a switching charge of $2 per car for both kinds of traffic since November 14, 1914.

The physical conditions surrounding the interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga, on the one hand, and the Tennessee Central, on the other, in reference to the number and location of industries, the switching movements, involved, and the like, are set forth in detail in the report of the Commission (33 I. C. C., at p. 86). Without restating them here, it is sufficient to say that we entirely concur in the finding of the Commission that the physical conditions of interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga and the Tennessee Central are not shown to differ substantially from the conditions of interchange between the lines of the Louisville & Nashville and the Nashville & Chattanooga, and that, moreover, none of the conditions relating to the switching Tennessee Central traffic appear to differ materially from the conditions of interchange between the lines of the Louisville & Nashville and the Nashville & Chattanooga prior to the establishment of the Terminals.

Upon the foregoing facts, we have, after careful consideration, reached the following conclusions:

The operation jointly carried on by the Louisville & Nashville and the Nashville & Chattanooga under the Terminals agreement is not a mere exchange of trackage rights to and from industries on their respective lines at Nashville, under which each does all of its own switching at Nashville and neither switches for the other. It is, on the contrary, in substance and effect, an arrangement under which the entire switching service for each rail-

road over the joint and separately owned tracks is performed jointly by both, operating as principals through the Terminals as their joint agent; each railroad, as one of such joint principals, hence performing through such agency switching service for both itself and the other railroad. And the fact that the charge for such joint switching service is made on an approximately proportionate basis of actual cost, exclusive of fixed charges, against the railroad having the transportation haul, does not, in our opinion, change the underlying and dominant fact, that the switching service itself is performed by both railroads jointly, that is by each railroad operating as a joint principal through the means of the joint agency; the apportionment of the expenses relating only to the payment for the service and not to the joint performance of the service itself. And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely concur in the conclusion of the Commission that such joint switching operation "is essentially the same as a reciprocal switching arrangement," constituting a facility for the interchange of traffic between the lines of the two railroads, within the meaning of the second paragraph of Section 3 of the Interstate Commerce Act. That each railroad does not separately switch for the other, but that such switching operations are carried on jointly, is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers, could be easily put beyond the reach of the Act, and its remedial purpose defeated, by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done, rather than in the particular device employed or the names applied to those engaged in it. See, by analogy, United States v. Chicago Railroad, 237 U. S. 410, 413.

Being, in effect, a reciprocal switching operation carried on by the Louisville & Nashville and the Nashville & Chattanooga, constituting a facility for the interchange of traffic between these two railroads, it necessarily follows, under Section 3 of the Interstate Commerce Act, that equal facilities must be afforded all other lines for like interchange of traffic, without discrimination; and, that, under Section 15 of the Act, the Commission is authorized to require the railroads performing such reciprocal service to desist from any discriminatory service in respect to such switching operations. Pennsylvania Co. v. United States, 236 U. S. 351; Louisville Railroad v.

United States (U. S.), *sup.* at p. 20; Louisville Railroad v. United States (D. C.), *sup.*, at p. 683.

And in view of the fact that the physical conditions surrounding the interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga, on the one hand, and the Tennessee Central, on the other, are not substantially different from those surrounding the interchange of traffic between the lines of the Louisville & Nashville and the Nashville & Chattanooga, and that the cost to the Louisville & Nashville and the Nashville & Chattanooga of switching competitive Tennessee Central traffic is the same as that of switching its non-competitive traffic, we entirely concur in the conclusion of the Commission that the refusal of the Louisville & Nashville and the Nashville & Chattanooga to switch competitive traffic to and from the Tennessee Central on the same terms as non-competitive traffic, while interchanging both kinds of traffic on the same terms with each other, is unjustly discriminatory. Such discrimination is not, in our opinion, obviated by the fact that the joint switching operation of the Louisville & Nashville and the Nashville & Chattanooga involves the use of the joint Terminals which they have constructed at great expense, or the fact that under the Terminals agreement they contribute to the expense of maintaining the Terminals and carrying on their switching operations in the manner hereinbefore set forth. In Louisville Railroad v. United States (U. S.) *supra*, in which many of the facts hereinbefore set forth, appeared in the report of the Commission, which had found, as a fact, that the Louisville & Nashville and the Nashville & Chattanooga switched for each other, the Supreme Court, affirming the decree of this court, said:

> "Disregarding the complication arising out of joint ownership and the fact that each of the appellants switches for the other, it will be seen that the Commission is not dealing with an original proposition, but with a condition brought about by the appellants themselves. Under the provisions of the Commerce Act (24 Stat. 380) the reciprocal arrangement between the two appellants would not give them a right to discriminate against any person or 'particular description of traffic.' For, Section 3 requires railroad companies to furnish equal facilities for the interchange of traffic between their respective lines * * * 'provided that this should not be construed as requiring any such common carrier to give the use

of its tracks or terminal facilities to another carrier engaged in like business.' If the carrier, however, does not rest behind that statutory shield but chooses voluntarily to throw the Terminals open to many branches of traffic, it to that extent makes the yard public. Having made the yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of Section 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers can not say that the yard is a facility open for the switching of cotton and wheat and lumber but can not be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the yard was put back under the protection of the proviso to Section 3, the appellants can not open the yard for most switching purposes and then debar a particular shipper from privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others. * * * In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time furnishing switching service to each other on all business, and to the Tennessee Central on all except coal and competitive business. As long as the yard remained open and was used as a facility for switching purposes the Commission had the power to pass an order—not only prohibiting discrimination—but requiring the appellants to furnish equal facilities 'to all persons and corporations without undue preference to any particular class of persons.' "

And such discrimination being shown, we think it clear, under the provisions of the Interstate Commerce Act and the authorities above cited, the Commission is clearly authorized to require the Louisville & Nashville and the Nashville & Chattanooga to desist from such discrimination, and to establish and maintain a practice in regard thereto which shall be non-discriminatory.

The order made by the Commission requires the Louisville & Nashville and the Nashville & Chattanooga to desist from maintaining (a practice whereby they refuse to interchange interstate competitive traffic to and from

the tracks of the Tennessee Central at Nashville on the same terms as interstate non-competitive traffic, while interchanging both kinds of said traffic with each other on the same terms; and to establish, publish, maintain and apply to the switching of interstate traffic to and from the Tennessee Central tracks rates and charges with shall not be different from those which they contemporaneously maintain with respect to similar shipments from their respective tracks in said city). We find in the record substantial evidence sustaining the conclusions of the Commission on which this order is based; and are of the opinion that, on the facts established by the evidence, this order involved no error of law, and is clearly within the power of the Commission. It is, in our opinion, not invalid as requiring the Louisville & Nashville and the Nashville & Chattanooga to give the use of their tracks and terminal facilities to the Tennessee Central within the meaning of the proviso contained in Section 3 of the Interstate Commerce Act, or as involving transportation rather than switching and requiring the establishment of a joint rate and through route, or as violating the constitutional provision against taking property without due process of law. Louisville Railroad v. United States (U. S.), Sup., at pp. 18, 20; Louisville Railroad v. United States (D. C.), Sup., at p. 684. Nor is it affected by the fact that the Louisville & Nashville owns the majority of the stock of the Nashville & Chattanooga.

Neither is the order invalid as to the Louisville & Nashville by reason of the fact that it has no track connection with the Tennessee Central within the switching limits of the Terminals, since it, as a party to the Terminal agreement is carrying on switching operations for itself and for the Nashville & Chattanooga over the tracks of the Nashville & Chattanooga, which connect with the tracks of the Tennessee Central by an interchange track within such switching limits.

Neither does the order of the Commission, in our opinion, require the Louisville & Nashville and the Nashville & Chattanooga to either admit the Tennessee Central into the Terminal agreement, as a constituent member thereof, or to switch its competitive traffic at $3.00 per car, or at any other rate which may be less than the actual cost of service, exclusive of fixed charges. (All that the order requires is that so long as they interchange competitive and non-competitive traffic between their own lines on the same terms, they shall desist from making a distinction between competitive and non-competitive Ten-

nessee Central traffic; and that they shall establish and maintain rates for switching interstate Tennessee Central traffic which shall not be different from those which they contemporaneously maintain with respect to switching similar traffic for each other; in other words, that they shall cease discrimination in interswitching their respective interstate competitive and non-competitive traffic and that of the Tennessee Central.) There is nothing in the order which requires the Louisville & Nashville and the Nashville & Chattanooga to abrogate their Terminal agreement; they are merely required, if they see fit to maintain it, to make no distinction, in operating under it, between competitive and non-competitive Tennessee Central traffic, so long as they make no such distinction in their own traffic, and, whether they carry on their future switching operations separately or jointly, to publish and maintain rates applicable to the switching of interstate Tennessee Central traffic, both competitive and non-competitive, which shall be the same as those for switching their own interstate traffic. If either the charges which they now make for switching non-competitive Tennessee Central traffic, or those which, through the Terminals, they now make each other, are unreasonably low, as involving no element of fixed charges, or otherwise, this can be obviously remedied, consistently with the order of the Commission, by publishing and maintaining just and reasonable charges for switching their own interstate competitive and non-competitive traffic respectively, which shall likewise apply in the switching of similar Tennessee Central interstate traffic, although of course, to the extent and in the proportion that they are proprietors of and share in the revenues of the Terminals, they will receive indirectly reimbursement for the switching charges made in reference to their own traffic.

We therefore conclude that the application of the Louisville & Nashville and the Nashville & Chattanooga for a temporary injunction should be denied. And since there is exhibited with and as a part of the petition all the evidence taken before the Commission, we are constrained to conclude that the petition shows on its face no equity or ground for permanently enjoining the enforcement of the order of the Commission, which is the ultimate relief sought. We are hence of the opinion that the motion of the United States and of the Commission to dismiss the petition should, as to the petitioning railroads, be sustained; this being a matter within the authority of the three judges now composing the court, un-

der the provision of the Act of 1913, *Sup.*, relating to the final hearing before three judges of any suit brought to suspend or set aside an order of the Commission; the hearing of a motion to dismiss a petition for want of equity being, in our opinion, a final hearing within the meaning of such provision.

And while the Terminal Company is shown by the proof to be solely a holding company carrying on no railroad or switching operations whatever, the order rendered against it by the Commission having been apparently inadvertently made and probably intended against the Terminals, the unincorporated association through which the two railroads carry on their switching operations, yet no material injury to it is shown from the order, which apparently can not apply to or affect it in any way; hence no ground for the issuance of an injunction appears at its instance, either interlocutory or permanent, a court of equity not enjoining merely abstract and theoretical injuries which involve no substantial prejudice. People v. Canal Board, 55 N. Y. 390; Drummond Tobacco Co. v. Randle, 114 Ill. 412; Willcox v. Trenton Potteries, 64 N. J. Eq. 173; Atkins v. Chilson, 7 Metc. (Mass.) 398.

A decree will accordingly be entered denying the motion of the petitioners for an interlocutory injunction, sustaining the motions of the United States and of the Commission, and dismissing the petition, with costs.

Said opinion was endorsed:

Filed September 18, 1915, H. M. Doak, Clerk, by F. B. McLean, D. C.

On September 18, 1915, the court lodged with the clerk the following proposed decree, subject to application for change within five days:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL.,

vs. No. 30. IN EQUITY.

UNITED STATES OF AMERICA, ET AL.

This cause came on to be heard on the motion of the petitioners for an interlocutory injunction restraining the enforcement of the order of the Interstate Commerce Commission complained of herein *pendente lite*, and upon motions of the United States of America and the Interstate Commerce Commission to dismiss the petition; which said motions were heard before three judges, as provided by the Act of October 22, 1913, chap. 32; and, having been argued by counsel and considered by the court, and the court having handed down its *per curiam* opinion thereon, it is, in accordance therewith, ordered, adjudged, and decreed by the court as follows:

1. That the motion of the petitioners for an interlocutory injunction be, and the same hereby is, denied; and

2. That the motion of the United States of America and the Interstate Commerce Commission to dismiss the petition be, and the same hereby is, sustained, and the petition herein be and hereby is dismissed, at the cost of the petitioners, for which execution will issue. Approved for entry.

SANFORD, *Judge*.

Presented September 18, 1915.

Requests for any addition or change to be presented by September 23, 1915.

On September 23, 1915, plaintiffs filed a written motion to amend the decree proposed to be entered upon the above opinion:

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - *Plaintiffs,*

vs. No. 30. IN EQUITY.

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

Come the plaintiffs and move the court to alter and amend the order proposed herein on September 18, 1915, denying their application for an injunction and dismissing their bill, by now granting an interlocutory injunction pending the appeal of this case to the Supreme Court of the United States, or otherwise by proper order maintaining the *status quo* until said appeal shall be decided, said amended order to be upon such terms, as to execution of a bond and the prosecution in good faith of said appeal within sixty days, as the court may deem proper.

H. L. STONE,
KEEBLE & SEAY,
CLAUDE WALLER,
E. S. JOUETT,
Attorneys for Plaintiffs.

Said motion was endorsed:
Filed September 23, 1915, H. M. Doak, Clerk, by F. B. McLean, D. C.

On October 22, 1915, the court filed its second *per curiam* opinion:

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

LOUISVILLE & NASHVILLE RAILROAD CO.,

vs. No. 30. IN EQUITY.

UNITED STATES OF AMERICA, ET AL.

Before WARRINGTON, Circuit Judge, and McCALL and SANFORD, District Judges.

Per Curiam. In the opinion heretofore handed down in this cause, it was directed that a decree be entered

denying the motion of the petitioners for an interlocutory injunction and dismissing the petition. Before the entry of such decree the petitioners moved the court to modify the proposed order by granting them an interlocutory injunction pending an appeal to the Supreme Court, or otherwise by proper order maintaining the *status quo* until such appeal should be decided, upon such terms as to execution of bond and prosecution of the appeal as the court might deem proper. This motion has been heard by the court after due notice.

The inherent authority of a court of equity, in the exercise of a sound discretion, to accompany a decree changing the *status quo* with an appropriate provision nevertheless preserving the *status quo* pending an appeal, is clear. Hovey v. McDonald, 109 U. S. 150, 151, 162. This case was followed by Thayer, Circuit Judge, in Cotting v. Stockyards Co. (C. C.), 82 Fed. 850, 857, in which, in a suit to enjoin the enforcement of a State statute, the court in its final decree, although denying an injunction and dismissing the bill, nevertheless, upon its own initiative, in view of the probability of an appeal, the importance of the questions involved, the doubt with which they were baalnced, and the great harm which would result to the plaintiffs in the enforcement of the statute pending the appeal in the event the decree should be reversed, at the same time restored a restraining order that had been vacated by a former decree in the cause and continued the same in force pending the taking and determination of an appeal to the Supreme Court, upon conditions set forth in the opinion. This action of the Circuit Court was set forth *in extenso* in the statement of the case made by Mr. Justice Brewer in delivering the opinion of the Supreme Court on appeal, with, it seems, implied approval, and in the opinion itself it was stated that the Circuit Judge, although denying the relief sought by the plaintiffs, had "exercised his power of continuing the restraining order until such time as these questions could be determined," thus inferentially at least, if not expressly, recognizing the continuance of the restraining order as a proper exercise of "the power" of the Circuit Court under such circumstances. Cotting v. Stockyards Co., 183 U. S. 79, 80, 83. This principle was furthermore recognized in Louisville Railroad v. Siler (C. C.), 186 Fed. 176, 203, decided by three judges, two of whom are sitting in the present case, and in which, while denying the complainant's motion for an interlocutory injunction, the court, upon its own initiative, in view of the probability of an appeal, continued a previous restraining order until an oppor-

tunity had been given to the plaintiff to secure a review upon appeal, upon terms prescribed in the order, and see, by analogy, Interstate Commission v. Louisville Railroad (C. C.), 101 Fed. 146, 148, in which the court, after entering a decree granting an injunction restraining the plaintiffs from disobeying an order of the Interstate Commerce Commission, subsequently, at the same term, upon the application of the defendants, suspended the execution of such decree pending an appeal by the plaintiffs, upon conditions set forth in the opinion, and superseded the injunction pending such appeal.

The majority of the court are of opinion that this inherent power of a court of equity to maintain the *status quo* pending an appeal, is not impaired or lessened by any of the several provisions of the Interstate Commerce Act, the Act creating the Commerce Court (subsequently embodied in Sections 200, *et seq.* of the Judicial Code) or the Act of October 22, 1913, c. 32, abolishing the Commerce Court and transferring its jurisdiction to the District Courts of the United States, upon which the defendants rely as limiting the authority of the court in the premises.

It further appears from the affidavits submitted by the petitioners, which are not controverted, that in the event the decree of this court denying the injunction prayed by the petitioners and dismissing their bill should be reversed by the Supreme Court, a great and irreparable injury would in the meantime have resulted to the petitioners by reason of the diversion of part of their traffic entering and leaving Nashville by competing railroads enabled to obtain access to local industries on their lines through the enforcement of the order of the Interstate Commerce Commission, and the expense and disturbance of their business caused by changing their former practices in the meantime so as to comply with the order of the Commission and the publication of new tariffs. And, on the other hand, it does not clearly appear that any particular individuals would suffer material financial injury in the event the order of the Commission is stayed for a short time so as to enable the petitioners to perfect their appeal and to present to the Supreme Court an application for a preliminary suspension order of the Commission pending the hearing of the appeal in the Supreme Court, in accordance with the practice recognized in Omaha Street Railway v. Interstate Commission, 222 U. S. 582, 583.

It results, therefore, that in the opinion of a majority of the court, in view of the importance of the questions

involved in this cause, and the irreparable injury which will result to the petitioners from the enforcement of the decree in this cause, if reversed, unless a short stay is granted, that the decree whose entry has heretofore been directed denying the preliminary injunction and dismissing the petition, should, under all the circumstances of the case, in the exercise of a sound discretion, be modified so as to provide that if the petitioners shall within thirty days from the entry of such decree take and perfect an appeal to the Supreme Court and also present to that court, within such thirty days, a petition for a preliminary suspension of the order of the Commission pending the determination of such appeal, the enforcement of the order of the Commission should be stayed until a decision by the Supreme Court upon the question of granting such preliminary suspension of the order of the Commission shall be rendered; provided, however, further, that in addition to the ordinary appeal bond, the petitioners shall also, at or before the time of the allowances of an appeal, make and file in this court their bond, in the penal sum of $25,000, payable to the clerk of this court, with sureties to be approved by him, conditioned that in the event the petitioners shall not, within thirty days from the entry of such decree, take and perfect an appeal to the Supreme Court and also present to that court, within such thirty days, a petition for a preliminary suspension of the order of the Commission pending such appeal, or in the event the appeal from the decree of this court is dismissed by the petitioners or the decree of this court denying the interlocutory injunction and dismissing the petition is affirmed by the Supreme Court, they will, on demand, pay to the party or parties entitled thereto, all legal damages accruing to them by reason of the stay of the order of the Commission granted by such decree.

Said opinion was endorsed:
Filed October 22, 1915.

On October 22, 1915, the court entered the following decree denying an injunction, discussing bill and allowing a temporary stay:

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

LOUISVILLE & NASHVILLE RAILROAD CO.,

vs. No. 30. EQUITY.

UNITED STATES OF AMERICA, ET AL.

This cause came on to be heard on the motion of the petitioners for an interlocutory injunction restraining the enforcement of the order of the Interstate Commerce Commission complained of herein *pendente lite;* the motions of the United States of America and the Interstate Commerce Commission to dismiss the petition; and the Supplemental motion of the petitioners for an order preserving the *status quo* pending the determination of an appeal to the United States Supreme Court; which said motions were heard before three judges, as provided by the Act of October 22, 1913, Chap. 32, and have been argued and considered by the court, and the court having handed down its *per curiam* opinions thereon, it is, in accordance therewith, ordered, adjudged and decreed by the court as follows:

1. That the motion of the petitioners for an interlocutory injunction be, and the same hereby is, denied; and

2. That the motion of the United States of America and the Interstate Commerce Commission to dismiss the petition be, and the same hereby is, sustained, and that the petition herein be, and hereby is, dismissed, at the costs of the petitioners, for which execution will issue.

3. Provided, however, that if the petitioners shall, within thirty days from the entry of this decree, take and perfect an appeal to the Supreme Court and also within such thirty days present to that court a petition for a preliminary suspension of the aforesaid order of the said Commission pending the determination of such appeal, the enforcement of the said order of the said Commission shall be, and hereby is stayed until a decision by the Supreme Court upon the question of granting such preliminary suspension of said order of the said

Commission shall be rendered; provided further, however, that in addition to the ordinary appeal bond, the petitioners shall also, at or before the time of the allowance of the appeal, make and file in this court their bond, in the penal sum of $25,000, payable to the clerk of this court, with sureties to be approved by him, conditioned that in the event the petitioners shall not, within thirty days from the entry of such decree take and perfect an appeal to the Supreme Court and present to that court, within such thirty days, a petition for preliminary suspension of said order of the said Commission pending such appeal, or in the event that the appeal from the decree of this court is dismissed by the petitioners, or the decree of this court denying the interlocutory injunction and dismissing the petition is affirmed by the Supreme Court, they will, on demand, pay to the party or parties entitled thereto all legal damages accruing to them by reason of the stay of said order of the said Commission granted by this decree.

Approved for entry.

SANFORD, *Judge.*

On November 2, 1915, as of November 1, 1915, plaintiffs filed the following petition for an appeal to the Supreme Court:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Plaintiffs,*

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE,
TRAFFIC BUREAU OF NASHVILLE,
TENNESSEE CENTRAL RAILROAD COMPANY, - *Defendants.*

PETITION FOR APPEAL.

To the Honorable Edward T. Sanford, District Judge:

The above-named Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway,

and Louisville & Nashville Terminal Company, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 22d day of October, A. D., 1915, do hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of said court, in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

H. L. STONE,
W. A. COLSTON,
CLAUDE WALLER,
E. S. JOUETT,
Solicitors for Plaintiffs.

Endorsed:

Filed November 2, 1915, as of November 1, 1915.
H. M. Doak, Clerk, by F. B. McLean. Appeal allowed.

Citation will issue upon the giving by the petitioners of a bond in the sum of one thousand dollars with sureties approved by me, conditioned for the payment of costs as required by law. This November 1, 1915.

EDWARD T. SANFORD,
District Judge.

On November 1, 1915, plaintiffs filed the following assignment of errors:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Plaintiffs,*

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE,
TRAFFIC BUREAU OF NASHVILLE,
TENNESSEE CENTRAL RAILROAD COMPANY, - *Defendants.*

ASSIGNMENT OF ERRORS.

Now come the plaintiffs in the above-entitled cause and file the assignment of errors hereinafter set forth, upon which they will rely in their prosecution of the appeal to the Supreme Court in the above-entitled cause from the decree made by this Honorable Court on the 22d day of October, 1915.

Only one error, in effect is relied upon, and that is the finding of the court that the undisputed facts constitute a switching of competitive cars by each of plaintiffs for the other, and hence that their refusal to switch competitive cars for the Tennessee Central Railroad Company constitutes an unjust discrimination. This error is set out more formally in the following assignment of errors:

I.

The court erred in denying the application of plaintiffs for an interlocutory injunction herein and in dismissing their bill.

II.

Switching by one railroad company for another, as meant in cases of this sort, is the movement, *by the company upon whose tracks an industry is located,* of a car between that industry and the point of interchange with another railroad, as the beginning of an outbound, or the

ending of an inbound, transportation haul *over the other railroad.*

Here the uncontroverted facts and circumstances existing at Nashville in connection with the acquisition, maintenance, and operation of joint terminals by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway show indisputably, as a matter of law, that plaintiffs do not switch traffic for each other, either competitive or non-competitive, but that each in effect does its own switching, under a valid, joint owning and operating arrangement whereby they acquired jointly their central and principal terminals at a cost of several million dollars, and to these each contributed its privately owned tracks within the switching limits, and all these terminals are operated jointly, the expense being shared substantially in proportion to the number of cars handled for each, so that each thus pays for the movement of its own cars, neither pays the other any switching charge, and none is paid by the shipper.

The court, therefore, erred in holding that the arrangement between the plaintiffs for the joint ownership, maintenance and operation of the terminals at Nashville is in substance or effect equivalent to one of said companies switching for the other, or is essentially the same as a reciprocal arrangemeent, constituting a facility for the interchange of traffic between the lines of the two railroads within the meaning of the second paragraph of Section 3 of the Interstate Commerce Act; in holding that they must afford such facility to the Tennessee Central Railroad Company; and in holding that their refusal so to do and to switch competitive traffic to and from the Tennessee Central on the same terms as non-competitive traffic, when both kinds of traffic to and from their respective roads are handled alike under their joint arrangement is unjustly discriminatory.

III.

Based upon the above conclusions, the Interstate Commerce Commission entered an order commanding plaintiffs to desist from maintaining a practice whereby they refuse to interchange interstate competitive traffic to and from the tracks of the Tennessee Central at Nashville on the same terms as interstate non-competitive traffic, while interchanging both kinds of said traffic with each other on the same terms, and commanding plaintiffs to establish, publish, maintain and to apply to the switching of interstate traffic to and from the Tennessee Central tracks

rates and charges which shall not be different from those which they contemporaneously maintain with respect to similar shipments from their respective tracks in said city.

The court erred in holding that this order was supported by substantial evidence and that, upon the uncontroverted evidence, it involves no error of law; and in not holding that the report and order of the Commission were contrary to the indisputable nature of the evidence.

Wherefore, plaintiffs pray that said decree be reversed and that said District Court for the Middle District of Tennessee be directed to enter a decree reversing the decision of the lower court in said cause.

H. L. STONE,
W. A. COLSTON,
CLAUDE WALLER,
E. S. JOUETT,
Solicitors for Plaintiffs.

Filed November 1, 1915. H. M. Doak, Clerk, by E. L. Doak, D. C.

On November 2, 1915, the plaintiffs filed the special bond in the sum of twenty-five thousand dollars ($25,000) required in order allowing stay pending appeal:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Appellees.*

SPECIAL BOND REQUIRED BY THE COURT IN CONNECTION WITH ITS STAY ORDER OF OCTOBER 22, 1915.

Known all Men by These Presents:

That we, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, and Louisville & Nashville Terminal Company, as prin-

cipals, and the National Surety Company, a corporation, duly authorized to do business in the State of Tennessee and duly empowered, among other things, to sign as surety bonds of this character, and this bond in particular, are held and firmly bound unto the United States of America, Interstate Commerce Commission, City of Nashville, Traffic Bureau of Nashville, the Tennessee Central Railroad Company, and any other parties entitled to the benefit of this bond under the court's order herein, in the sum of twenty-five thousand ($25,000) dollars, lawful money of the United States, to be paid to them and their respective representatives and successors; to which payment, well and truly to be made, we bind ourselves and our representatives and successors, jointly and severally, by these presents:

This bond, however, is conditioned as follows:

Wheeras, in the above-entitled action, the court, before entering its judgment therein, indicated that it would deny the plaintiff's application for an injunction, and would dismiss their bill, whereupon plaintiffs entered a motion for an order of suspension, maintaining the *status quo* pending an appeal, which they contemplated taking to the Supreme Court of the United States, and

Whereas the court, as a part of its final judgment entered herein October 22, 1915, denying the aforesaid injunction and dismissing plaintiffs' bill, embraced therein the following proviso, to-wit:

> "3. Provided, however, that if the petitioners shall, within thirty days from the entry of this decree, take and perfect an appeal to the Supreme Court and also within such thirty days present to that court a petition for a preliminary suspension of the aforesaid order of the said Commission pending the determination of such appeal, the enforcement of the said order of the said Commission shall be, and hereby is stayed until a decision by the Supreme Court upon the question of granting such preliminary suspension of said order of the said Commission shall be rendered; provided further, however, that in addition to the ordinary appeal bond, the petitioners shall also, at or before the time of the allowance of the appeal, make and file in this court their bond, in the penal sum of $25,000, payable to the clerk of this court, with sureties to be approved by him, conditioned that in the event the petitioners shall not, within thirty days from the entry of such decree take and perfect an appeal to the Supreme Court, and present to that court, within such

thirty days, a petition for preliminary suspension of said order of the said Commission pending such appeal, or in the event that the appeal from the decree of this court is dismissed by the petitioners, or the decree of this court denying the interlocutory injunction and dismissing the petition is affirmed by the Supreme Court, they will, on demand, pay to the party or parties entitled thereto all legal damages accruing to them by reason of the stay of said order of the said Commission granted by this decree."

Now, therefore, if the above-named Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company shall comply with the requirements of that portion of the court's judgment above quoted, then this obligation shall be void, otherwise to remain in full force and effect.

Louisville & Nashville Railroad Company
By W. L. MAPOTHER,
Its Agent.

Nashville, Chattanooga & St. Louis Railway
By JNO. HOWE PEYTON,
Its Agent.

Louisville & Nashville Terminal Company
By W. L. MAPOTHER,
Its Agent.

National Surety Company
By WM P. RUTLAND,
Attorney-in-Fact.

Filed November 2, 1915, as of November 1, 1915. H. M. Doak, Clerk, by F. B. McLean, D. C.

The within bond is approved, both as to sufficiency and form, this 1st day of November, 1915.

H. M. DOAK,
Clerk.

On November 3, 1915, plaintiffs filed the following regular bond on appeal:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Appellees.*

BOND ON APPEAL.

Know All Men by These Presents:

That we, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company, as principals, and the National Surety Company, a corporation, duly authorized to do business in the State of Tennessee and duly empowered, among other things, to sign as surety bonds of this character, and this bond in particular, are held and firmly bound unto the United States of America, Interstate Commerce Commission, City of Nashville, Traffic Bureau of Nashville, and the Tennessee Central Railroad Company, in the sum of one thousand ($1,000) dollars lawful money of the United States, to be paid to them and their respective representatives and successors, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our respective representatives and successors by these presents.

This bond, however, is conditioned as follows:

Whereas, the above-named Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company have prosecuted an appeal to the Supreme Court of the United States to reverse the decree and judgment of the District Court for the Middle District of Tennessee, entered on October 22, 1915, in the above-entitled cause.

Now, therefore, if the above-named Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company shall prosecute their said appeal to effect and

answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

Louisville & Nashville Railroad Co.
By ED. T. SEAY,
Its Agent and Attorney.

Nashville, Chattanooga & St. Louis Railway
By JNO. HOWE PEYTON,
President.

Louisville & Nashville Terminal Co.
By ED. T. SEAY,
Its Agent and Attorney.

National Surety Company
By W. P. RUTLAND,
Atty.-in-fact.
(Surety Co.'s Seal.)

(Seal of N., C. & St. L. R'y. Attest: J. B. Hill, Asst. Secy.)

The within bond is approved both as to sufficiency and form this 2d day of November, 1915.

EDWARD T. SANFORD,
District Judge.

On November 3, 1915, the clerk issued the following citation, with divers copies for all defendants:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
LOUISVILLE & NASHVILLE TERMINAL COMPANY, *Plaintiffs,*

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
CITY OF NASHVILLE,
TRAFFIC BUREAU OF NASHVILLE,
TENNESSEE CENTRAL RAILROAD COMPANY, - *Defendants.*

To the United States of America,
Interstate Commerce Commission,
City of Nashville,
Traffic Bureau of Nashville.
Tennessee Central Railroad Company.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, D. C., within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Middle District of Tennessee, from a final decree of said court filed and entered on the 22d day of October, 1915, in that certain suit, being Equity No. 30, wherein the Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Terminal Company are plaintiffs, and you are defendants and appellees, to show cause, if any there be, why the decree rendered against said appellants, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Hon. Edward T. Sanford, United States District Judge for the Middle District of Tennessee, this 2d day of November, 1915.

(Signed) EDWARD T. SANFORD,
United States Judge for the Middle District of Tennessee.

Copies of said citation were thereupon returned, upon which appeared the following acknowledgments of service: